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In the Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC., PETITIONER

v.

FRANCISCO J. ESPINOSA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the confirmation and subsequent completion of respondent's plan under Chapter 13 of the Bankruptcy Code had the effect of discharging his student loan debt, notwithstanding his failure to initiate an adversary proceeding to determine dischargeability and the lack of any determination by the bankruptcy court that "excepting [the] debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8).

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INTEREST OF THE UNITED STATES

The United States is both a direct lender and a guarantor of student loans. The government's current loan portfolio is worth approximately $618 billion. The Court's resolution of this case also may have implications for various other debts that are owed to the federal government and are non-dischargeable in bankruptcy, including taxes or customs duties; non-tax fines, penalties, and forfeitures; and restitution orders. The United States therefore has a significant interest in this case.

STATEMENT

1. a. Chapter 13 of the Bankruptcy Code permits "individual debtors [to] obtain adjustment of their indebtedness through a flexible repayment plan approved by a bankruptcy court." *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 327 (1993). To proceed under Chapter 13, a debtor must have "regular income" and his indebtedness must be below certain statutory limits. 11 U.S.C. 109(e).

A debtor initiates a Chapter 13 proceeding by filing a petition with the appropriate bankruptcy court, 11 U.S.C. 301(a), and he must file a proposed plan within 15 days after filing the petition, 11 U.S.C. 1321; Fed. R. Bankr. P. 3015(b). The bankruptcy court holds a confirmation hearing, 11 U.S.C. 1324, and must confirm the plan if it satisfies certain criteria, 11 U.S.C. 1325. The debtor must then make all payments required under the plan, 11 U.S.C. 1326, a process that takes between three and five years. 11 U.S.C. 1322(d), 1325(b)(4). If the debtor completes the plan, the bankruptcy court enters a discharge order under 11 U.S.C. 1328(a), which "operates as an injunction against" efforts to "collect, recover or offset any * * * debt" that was "discharged under [that] section." 11 U.S.C. 524(a)(1) and (2).

b. A full-compliance discharge under Chapter 13 "is broader than the discharge received in any other chapter" of the Bankruptcy Code. 8 *Collier on Bankruptcy* ¶ 1328.01, at 1328-5 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. Sept. 2005) (*Collier*). Certain debts, however, remain non-dischargeable even in a Chapter 13 proceeding. In particular, Chapter 13 incorporates 11 U.S.C. 523(a)(8), which provides that a discharge order "does not discharge an individual debtor from" most student loan debt "unless excepting such

debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." See 11 U.S.C. 1328(a)(2).[1]

c. The Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) establish certain procedures for "determin[ing] the dischargeability of a debt." Fed. R. Bankr. P. 7001(6). "Because student loan debts are not automatically dischargeable," those Rules "require the debtor to file an 'adversary proceeding' against" the relevant creditor in order to obtain a discharge. *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 451 (2004) (*Hood*).

Although an adversary proceeding "is considered part of the original bankruptcy case," *Hood*, 541 U.S. at 452, it "has all the trappings of civil litigation," *Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) (en banc). The debtor initiates an adversary proceeding by filing a complaint, Fed. R. Bankr. P. 7003, which must satisfy the requirements of Federal Rule of Civil Procedure 8, see Fed. R. Bankr. P. 7008, and must be served on the creditor along with a summons issued by the clerk. Fed. R. Bankr. P. 7004. In addition to the methods of service permitted by the Federal Rules of Civil Procedure, the Bankruptcy Rules also authorize service by mail. Fed. R. Bankr. P. 7004(b). If the creditor is a corporation, service must be made on "a managing or general agent, or * * * any other agent authorized by appointment or

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[1] At the time of the discharge order in this case, Section 523(a) also provided for discharge of any student loan debt that first became due more than seven years before the filing of the bankruptcy petition. 11 U.S.C. 523(a)(8)(A) (1994). That provision is not at issue here because respondent filed his bankruptcy petition less than five years after receiving his first student loan. Pet. App. 60-61.

by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3). If the federal government is a creditor, as often is the case with student loan debts, service must be made on the Attorney General, the local United States Attorney, and the appropriate federal agency. Fed. R. Bankr. P. 7004(b)(4) and (5).

The procedures for providing notice of a Chapter 13 plan are considerably less rigorous. The clerk must give all parties in interest at least 25 days' written notice of the deadline for filing objections and the date of the confirmation hearing. Fed. R. Bankr. P. 2002(b). That notice need not include a copy of the plan itself; "a summary of the plan" is sufficient. Fed. R. Bankr. P. 3015(d). In addition, unlike an adversary complaint, notice under Bankruptcy Rule 2002(b) need not be directed to an agent authorized to receive service of process. Instead, notice may be "mailed to the address shown on the list of creditors or schedule of liabilities" filed by the debtor along with the bankruptcy petition. Fed. R. Bankr. P. 2002(g)(2).

2. During 1988 and 1989, respondent obtained four federally guaranteed student loans that totaled $13,250 and accrued interest at varying rates. Pet. App. 52, 60-61. On December 7, 1992, respondent filed a Chapter 13 petition and a proposed plan. *Id.* at 61. The only specific indebtedness identified in respondent's bankruptcy petition was his student loan debt. J.A. 15-20. The plan proposed to repay only the principal on that debt, and it stated that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." J.A. 26. The plan did not assert that failing to discharge the interest on respondent's student loan debt would impose an "undue hardship" on respondent and his dependents, nor

did it suggest that plan confirmation would constitute an "undue hardship" finding by the bankruptcy court.

Respondent did not initiate an adversary proceeding in order to determine the dischargeability of the interest on his student loan debt. Instead, the clerk of the bankruptcy court mailed a one-page notice form and a copy of respondent's proposed plan to petitioner at the post office box. Pet. App. 14 n.4, 71; J.A. 34 (copy of notice). Immediately below the caption, the plan stated: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." J.A. 23. The plan also listed the deadline for filing a proof of claim, J.A. 26–27, and stated that "[o]bjections, by any creditor, must be filed seven (7) days prior to the hearing on Confirmation of [the] Plan." J.A. 26.

The clerk's notice was stamped "REC'D" by petitioner's litigation department on December 18, 1992. J.A. 34. On January 8, 1993, petitioner filed a proof of claim for $17,832.15, which represented both the principal and accrued interest on respondent's student loans. J.A. 35 & n.**; Pet. App. 62 n.2. Petitioner did not object to confirmation of the plan, and respondent did not object to petitioner's proof of claim. *Id.* at 62, 72.

On May 6, 1993, the bankruptcy court entered an order stating that respondent's "Chapter 13 plan is approved and the Debtors are ordered to comply therewith." J.A. 43. The court made no finding that failing to discharge the interest on respondent's student loan debt would impose undue hardship on respondent and his dependents. Petitioner was not provided with a copy of the bankruptcy court's confirmation order. Pet. App. 62.

A month after the bankruptcy court entered its confirmation order, the Chapter 13 Trustee mailed petitioner a pre-printed form labeled "TRUSTEE'S NO-

TICE TO CREDITOR." J.A. 44. That form had a box checked stating that "[t]he amount of the claim filed differs from the amount listed for payment in the plan" and that "[y]our claim will be paid as listed in the plan." *Ibid.* The form also stated that "[i]f an interested party wishes to dispute the above stated treatment of the claim, it is the responsibility of the party to address the dispute" by notifying the trustee. *Ibid.* Petitioner did not respond to that notice. Pet. App. 63.

Respondent completed all payments provided for in the plan, including the $13,250 designated for payment to petitioner. Pet. App. 63. On May 30, 1997, a second bankruptcy judge entered a one-page order stating that respondent was "discharged from all debts provided for by the plan or disallowed under 11 [U.S.C.] § 502, *except*" for six specified categories of debt. J.A. 46 (emphasis added). The third category listed included "any debt * * * for a student loan." J.A. 46. Respondent neither sought reconsideration of the discharge order nor filed a notice of appeal. Pet. App. 52.

3. Pursuant to a reinsurance agreement, respondent's loans were assigned to the United States Department of Education, which commenced collection efforts. Pet. App. 63. In 2003, respondent reopened his bankruptcy case, and he later filed a motion asking the bankruptcy court, *inter alia*, to order various entities, including petitioner, to cease all collection efforts. C.A. E.R. 39-43. Petitioner opposed that motion and filed a cross-motion for relief from the bankruptcy court's confirmation order, arguing that the order had been entered in violation of the Bankruptcy Code and Rules and that respondent's student loan debt had not been discharged. Pet. App. 6; C.A. E.R. 72-87. Petitioner also requested a recall of respondent's loans from the Department of

Education, which was completed on June 3, 2004. Pet. App. 63.

On August 12, 2004, a third bankruptcy judge granted respondent's motion in relevant part, denied petitioner's cross-motion, and ordered all claimants to "cease and desist all collection activity against" respondent. Pet. App. 79.

Petitioner appealed to the district court, which reversed. Pet. App. 60-70. The district court concluded that the bankruptcy court's confirmation order was "void," and it remanded "for an adversary hearing to determine whether [respondent] qualifies under the 11 U.S.C. § 523(a)(8) exception for the discharge of his student loan." *Id.* at 60.

4. The court of appeals reversed and remanded. Pet. App. 1-27.

a. In an initial per curiam opinion, the court of appeals remanded the case to the bankruptcy court for the limited purpose of addressing whether its discharge order—which, as noted above, specifically excluded student loan debt from discharge—"was entered as a result of a clerical error and, if so, whether to correct it so as to conform to [respondent's] Chapter 13 plan." Pet. App. 59. The court of appeals observed that such a limitation on discharge was "inconsistent with" the confirmed plan's terms, and it hypothesized that the clerk of the bankruptcy court may have generated the discharge order without tailoring it to "the facts of [respondent's] case." *Id.* at 57-58 (internal quotation marks and citation omitted).

b. On remand, the bankruptcy judge who had ruled on the 2003 motions issued a new order. The bankruptcy court found that the language excepting respondent's student loan debt from discharge "was inserted because

of a clerical mistake, because it was the clear intent of the Court, as reflected in the Chapter 13 Plan, as approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan." J.A. 48. The bankruptcy court ordered the relevant paragraph stricken from the discharge order, and further ordered that respondent "be * * * discharged from all obligations of any nature whatsoever arising from or relating to the Student Loans listed in" respondent's bankruptcy petition. *Ibid.*

c. Following the remand, the court of appeals reversed the district court's decision and remanded the case to the bankruptcy court with directions to reinstate its order enjoining any attempt to collect the unpaid portion of respondent's student loan debt. Pet. App. 26-27. The court framed the issue as "[w]hether a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan, if the creditor fails to object after notice of the proposed plan." *Id.* at 5. It concluded that such a discharge was consistent both with the Bankruptcy Code and Rules, *id.* at 8-18, and with the Due Process Clause, *id.* at 18-25.

The court of appeals determined that its previous decision in *Great Lakes Higher Education Corp.* v. *Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999) was "on all fours with our case" and "foreclose[d]" petitioner's statutory argument. Pet. App. 8. The court observed that petitioner could have "insist[ed] on the special procedures available to student loan creditors by objecting to the plan on the ground that there ha[d] been no undue hardship finding," but that petitioner had raised no such objection. *Id.* at 10; see *id.* at 14-15. The court also stated that "[a] bankruptcy discharge order is

a final judgment" and that "[e]rrors committed during the course of litigation must be corrected by way of a timely appeal." *Id.* at 11.

The court of appeals also rejected petitioner's argument "that the discharge order is void because [petitioner] was denied due process." Pet. App. 18. The court stated that a party who "is adequately notified of a pending lawsuit * * * is deemed to know the consequences of responding or failing to respond." *Id.* at 20. Because petitioner "receive[d] actual notice of [respondent's] bankruptcy case," the court of appeals concluded that it had suffered no violation of its rights under the Due Process Clause. *Id.* at 21.[2]

SUMMARY OF ARGUMENT

Respondent's student loan debt has not been discharged because petitioner did not waive or forfeit its right to contest discharge and the bankruptcy court has not made the undue hardship finding that is an essential prerequisite to discharge of such debt.

A. The court of appeals held that petitioner had waived its objection to discharge of a portion of respondent's student loan debt by failing either to object to the discharge in the bankruptcy court proceedings or to appeal the confirmation or discharge order. Under the Bankruptcy Code, however, the debtor must affirmatively secure an undue hardship finding in order to ob-

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[2] The court of appeals noted that some bankruptcy judges had announced that they would not confirm plans that purported to discharge student loan debts and that one bankruptcy judge had suggested that including such provisions in a proposed plan might subject a debtor's counsel to sanctions. Pet. App. 25-26. The court disapproved both practices, stating that "student loan debts can be discharged by way of a Chapter 13 plan" and that bankruptcy judges "have no business standing in the way" if a creditor fails to object. *Id.* at 26.

tain a discharge of student loan debt. The Bankruptcy Rules establish a procedure for obtaining such a finding, and the debtor is responsible for initiating that procedure. The court of appeals' waiver analysis has the practical effect of shifting to the creditor the burden that the Code and Rules place upon the debtor. By contrast, another provision of the same statutory section provides that certain non-dischargeable debts—but not student loan debts—are covered by a discharge order unless a creditor requests a hearing. The court of appeals' approach effectively subjects student loan debt to the same procedural regime, notwithstanding Congress's evident intent that the two categories of debt be treated differently.

Petitioner was not required to appeal from the confirmation or discharge order to preserve its right to seek repayment of respondent's remaining student loan debt after the plan was completed. The Bankruptcy Code states that a discharge order "does not discharge an individual debtor from" most student loan debt "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a) and (8). This provision is framed as a self-executing limitation on the effect of a discharge order rather than as a directive to bankruptcy courts about what plans to confirm. By contrast, numerous other provisions of the Bankruptcy Code are framed as directives to the bankruptcy court. To the extent that Section 523(a) is ambiguous in this regard, construing that provision as a limitation on the legal effect of a discharge order serves Congress's purposes by preventing debtors from circumventing statutory bans on the discharge of other categories of debt, such as domestic support obligations.

B. Discharge of student loan debt without an undue hardship finding is inconsistent with the background and purposes of Section 523(a)(8). For more than 30 years, Congress has acted repeatedly to restrict the discharge of student loan debt in bankruptcy, both to prevent abuses of the student loan system by debtors and to safeguard the financial integrity of the government entities and nonprofit institutions that participate in it.

C. Treating an undue hardship finding as a precondition to discharge is fair to both debtors and creditors. Because student loan debt is presumptively non-dischargeable, it makes sense to place the onus on debtors to request an undue hardship determination rather than on creditors to scrutinize every one of the vast number of Chapter 13 plans that they receive. There is no reason to believe that involved proceedings will be necessary every time a debtor seeks an undue hardship determination. Requiring a debtor to obtain such a determination in order to discharge a student loan debt also avoids creating ethical quandaries for debtors' attorneys.

D. Because respondent did not initiate an adversary proceeding and the bankruptcy court made no undue hardship finding in this case, respondent's student loan debt has not been discharged, and petitioner did not violate the discharge injunction by seeking to collect that debt. The Court therefore need not address the question whether or under what circumstances the waiver rule announced by the Ninth Circuit might violate the Due Process Clause.

ARGUMENT

THE BANKRUPTCY COURT'S DISCHARGE ORDER DID NOT DISCHARGE RESPONDENT'S STUDENT LOAN DEBT BECAUSE THE COURT DID NOT FIND, PURSUANT TO THE PROCEDURES SPECIFIED IN THE BANKRUPTCY RULES, THAT FAILURE TO DO SO WOULD CREATE UNDUE HARDSHIP FOR THE DEBTOR AND HIS DEPENDENTS

A. Petitioner Was Not Required To Demand An Adversary Proceeding Or To Appeal From The Confirmation Or Discharge Order To Preserve Its Right To Collect The Remainder Of Respondent's Student Loan Debt After Respondent's Chapter 13 Plan Was Completed

Respondent's Chapter 13 plan proposed to pay $13,250 to petitioner in satisfaction of respondent's student loan debt and to discharge the remainder of that debt. J.A. 26. Respondent did not contend, however, that a failure to discharge the remaining debt would subject him to undue hardship, he did not initiate the adversary proceeding that the Bankruptcy Rules specify as the required mechanism for resolving issues of dischargeability; and the bankruptcy court made no undue hardship finding. In holding that the bankruptcy court's discharge order nevertheless precluded petitioner from attempting to collect the remaining debt, the court of appeals found that petitioner had forfeited its right to insist that the statutory prerequisite to discharge be satisfied by failing (a) to object to the plan during the bankruptcy court proceedings and (b) to appeal from the confirmation and discharge orders. Pet. App. 10-11, 14-16. That analysis is erroneous.

1. Petitioner did not waive its right to an undue hardship determination by failing to object to respondent's plan or to demand an adversary proceeding

The court of appeals stated that, when a creditor receives notice of a proposed Chapter 13 plan that provides for the discharge of student loan debt, the creditor can "insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding." Pet. App. 10. The court further indicated that a creditor who fails to "insist" on an adversary proceeding in these circumstances thereby "waive[s] or forfeit[s]" any objection to discharge of the debt. *Ibid.* That analysis is inconsistent with the Bankruptcy Code, the Bankruptcy Rules, and this Court's decision in *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004).

a. Section 523(c) provides that "the debtor shall be discharged" from debts that fall within three of the 19 categories of non-dischargeable debt specified in Section 523(a) "unless" the creditor requests a hearing to determine whether a particular debt falls within a relevant category. 11 U.S.C. 523(c).[3] Student loan debt, however, is not among the categories of debt to which Subsection (c) applies. The logical inference is that a creditor need not request a hearing in order to prevent student loan debt from being discharged in the absence of an undue hardship finding. Accord S. Rep. No. 989, 95th Cong., 2d Sess. 79 (1978) (*Senate Report*) (stating that,

[3] The three categories are debts for things obtained by fraud or false pretenses (11 U.S.C. 523(a)(2)), debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" (11 U.S.C. 523(a)(4)), and debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" (11 U.S.C. 523(a)(6)). See 11 U.S.C. 523(c).

under Section 523(a)(8), "[t]he lender or institution is not required to file a complaint to determine the non-dischargeability of any student loan"). The court of appeals' approach, which treats a student loan creditor's failure to "insist" on an adversary proceeding as a waiver of the creditor's objection to discharge, effectively subjects student loan debt to the same procedural regime that applies to the debts specified in Section 523(c), notwithstanding Congress's evident intent to distinguish between the two categories.

b. The Bankruptcy Rules specify the procedures for resolving questions of dischargeability, including questions as to the presence or absence of "undue hardship" in student loan cases. Those Rules place the burden on the *debtor* to initiate an adversary proceeding through the filing of a complaint and service of the complaint and a summons. Fed. R. Bank. P. 7003, 7004. The practical effect of the court of appeals' approach is to reverse that burden by requiring the *creditor* either to demand an adversary proceeding or to forfeit his objection to discharge. Unlike notice of the plan itself, moreover, the summons and complaint must be specifically directed to an agent of the creditor who is "authorized by appointment or by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3); see pp. 3-4, *supra*. Like the requirement that the debtor initiate the adversary process, that heightened notice requirement is effectively negated if providing notice of the plan to some *other* agent transfers to the student loan creditor the burden of objecting to the discharge.

The court of appeals found that, so long as petitioner had constitutionally adequate notice of respondent's Chapter 13 plan, its failure to demand an adversary proceeding could appropriately be treated as a waiver of

any challenge to the dischargeability of respondent's student loan debt. Pet. App. 21. But the fact that an interested party has actual knowledge of pending legal proceedings does not mean, in and of itself, that the party's failure to assert its rights can be treated as a waiver. Rather, the determination whether a waiver has occurred may depend on whether the party has received the *type* of notice required by applicable law. See *City of New York* v. *New York, New Haven & Hartford Railroad*, 344 U.S. 293, 297 (1953) (holding, under the former Bankruptcy Act, that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred"); *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989) (Under the Federal Rules of Civil Procedure, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."); *Ruehle* v. *Educational Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679, 685 (6th Cir. 2005) (positing a hypothetical situation in which a plaintiff purported to commence a civil action by filing a motion and mailing it to the defendant). That principle applies with particular force here, where the Bankruptcy Rules squarely place the burden of initiating an adversary proceeding upon the debtor, and the effect of the court of appeals' waiver analysis is to shift that burden to the creditor.

c. This Court's decision in *Hood* confirms that it is the debtor's obligation to obtain an undue hardship finding rather than the creditor's obligation to insist on one. The Court in *Hood* held that "a proceeding initiated by a debtor to determine the dischargeability of a student

loan debt [owed to a State] is not a suit against the State for purposes of the Eleventh Amendment." 541 U.S. at 443. In reaching that conclusion, the Court observed that, because a student loan debtor must "affirmatively secure[] a hardship determination" in order to obtain a discharge, "the major difference between the discharge of a student loan debt and the discharge of most other debts" is that student loan creditors who decline to participate in the bankruptcy proceedings "might still receive some benefit: The debtor's personal liability on the loan may survive the discharge." *Id.* at 450. The Court also noted, with apparent approval, the debtor's concession that "even if [the creditor] ignores the summons and chooses not to participate in the proceeding the Bankruptcy Court cannot discharge her debt without making an undue hardship determination." *Id.* at 453-454.

The Court in *Hood* thus recognized that an actual undue hardship finding by the bankruptcy court is an essential prerequisite to discharge of a student loan debt, even when the debtor properly initiates an adversary proceeding and the creditor does not object to discharge. It follows *a fortiori* that a debtor who does *not* initiate an adversary proceeding cannot obtain a discharge of his student loan debt without an undue hardship finding simply because the creditor does not "insist" on a proceeding that it is the debtor's duty to invoke.[4]

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[4] The court of appeals cited *Hood*'s observation "that an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan." Pet. App. 17-18 (internal quotation marks and citation omitted); accord *Hood*, 541 U.S. at 453 ("The text of § 523(a)(8) does not require a summons, and absent [Federal Rule of Bankruptcy Procedure]

2. Petitioner was not required to appeal the confirmation or discharge order to preserve its right to collect respondent's remaining debt because, under the terms of the applicable Bankruptcy Code provisions, a discharge order does not discharge student loan debt in the absence of an undue hardship determination

The court of appeals also suggested (Pet. App. 10-11) that petitioner's failure to appeal either the confirmation or discharge order independently precluded it from seeking to collect respondent's remaining debt after the completion of respondent's plan. An appeal was unnecessary, however, because the discharge order ultimately entered in this case did not have the effect of discharging respondent's student loan debt.

a. The Bankruptcy Code provides that a discharge order "does not discharge" a covered student loan debt "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the

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7001(6) a debtor could proceed by motion."). But while the details of the procedural scheme are set forth in the Rules rather than the Code, the Court in *Hood* made clear that the *statute* imposes the basic requirement that the debtor must "affirmatively secure[] a hardship determination." *Id.* at 450. The court of appeals' approach, under which the debtor's submission of a plan that provides for discharge of student loan debt shifts to the creditor the burden of objecting, is thus inconsistent with the Code as well as with the Rules. In addition, the heightened notice requirements described above still would apply even if the Bankruptcy Rules *did* permit a debtor to seek to discharge a student loan debt by filing a motion rather than commencing an adversary proceeding. See Fed. R. Bankr. P. 9014(b) (providing that a "motion shall be served in the manner provided for service of a summons and complaint by Rule 7004").

debtor's dependents." 11 U.S.C. 523(a) and (a)(8).[5] This provision is not framed as a directive to the bankruptcy court. Instead, it is a "self-executing" limitation on the effect of a discharge order. *Hood*, 541 U.S. at 450; accord *Senate Report* 79 (describing Section 523(a)(8) as "self-executing"). Accordingly, the most natural reading of Section 523(a)(8) is that, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Hood*, 541 U.S. at 450; see *id.* at 444 (describing Section 523(a)(8) as providing that covered student loans "are not included in a general discharge order unless the bankruptcy court" makes an "undue hardship" finding).

Unlike Section 523(a), other provisions of the Bankruptcy Code *are* framed as directives to the bankruptcy court. Another provision in the same statutory Section provides that "the court shall" award costs and fees to the debtor in certain circumstances and "shall not award" costs and fees in other circumstances. 11 U.S.C. 523(d). Other provisions of the Bankruptcy Code, including provisions in Chapter 13, also provide that bank-

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[5] Section 523(a)(8) is not by its terms directly applicable to Chapter 13 cases in which the debtor successfully completes performance under a confirmed plan. Instead, Section 523(a)(8) is incorporated via Section 1328, which provides that "the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt * * * of the kind specified in" eight enumerated paragraphs of Section 523(a). 11 U.S.C. 1328(a) and (a)(2). "The effect of this [provision] is to exclude from the full-compliance discharge [under Chapter 13] those debts for educational loans that are nondischargeable under section 523(a)(8)." 8 *Collier* ¶ 1328.02[3][h], at 1328-20; accord Br. in Opp. 6 n.3 (describing Section 1328(a)(2) as "making § 523(a)(8) applicable in Chapter 13 cases").

ruptcy courts "shall not"[6] or "may not"[7] do certain things. Another provision states that an action "does not" have a certain effect "[u]nless the [bankruptcy] court, for cause, orders otherwise." 11 U.S.C. 349. In contrast, Section 523(a)(8) states that a discharge order "does not" have a certain effect "unless" a particular condition is satisfied.

That difference is significant. As the court of appeals explained, a final judgment is ordinarily binding, and an injunction must be obeyed, even if the issuing court has exceeded its authority or has committed legal error in the course of adjudicating the suit. Pet. App. 10-11. "[A] final judgment cannot be ignored or set aside just because it was the result of an error," but rather "must be corrected by way of a timely appeal." *Id.* at 11; see *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195, 2205 (2009). Under the statutory provisions governing discharge of student loan debt, however, petitioner was not required to appeal either the confirmation or the discharge order in order to preserve its right to collect respondent's debt after the Chapter 13 plan had been completed. Such an appeal was unnecessary because, in the absence of an undue hardship finding, a bankruptcy discharge "does not discharge an individual debtor from any debt" (11 U.S.C. 523(a)) for student loans covered by Section 523(a)(8).

The court of appeals emphasized that a "discharge injunction" comes "into force by operation of law upon entry of the discharge" and "preclud[es] the creditor, on

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[6] 11 U.S.C. 330(a)(4)(A), 366(c)(1)(B), 1328(f) and (g)(1).

[7] 11 U.S.C. 105(b), 326(b), 341(c), 505(a)(2), 706(c), 707(b)(1), (b)(2)(D) and (c)(3), 904, 921(e), 1112(c), 1129(d), 1222(c), 1225(b)(1), 1228(f), 1229(c), 1307(f), 1322(d)(2), 1325(b)(1), 1328(h), 1329(c), 1501(d), 1521(d).

pain of contempt, from taking *any* actions to enforce the discharged debt." Pet. App. 13. As the court of appeals' own description recognizes, however, the discharge injunction under the Bankruptcy Code is limited by its terms to "actions to enforce the *discharged* debt." *Ibid.* (emphasis added); see 11 U.S.C. 524(a)(1) (referring to "any debt discharged under section * * * 1328 of this title"), 524(a)(2) (discharge "operates as an injunction against" any act "to collect, recover or offset any such debt"). Because the effect of Section 523(a)(8) was to prevent the discharge from encompassing respondent's student loan debt in the absence of an undue hardship finding, the discharge injunction likewise did not cover that debt.

b. To the extent that the statutory language is otherwise ambiguous, this reading of Section 523(a) effectuates the intent of Congress by preventing debtors from evading statutory prohibitions on the discharge of other categories of debt. For example, Section 523(a)(1)(B)-(C) provides that a discharge order "does not discharge" specified types of tax debt; Section 523(a)(5) provides that it "does not discharge * * * any debt * * * for a domestic support obligation"; and Section 523(a)(9) provides that it "does not discharge" debts "caused by" the debtor's unlawful operation of a motor vehicle while impaired by drugs or alcohol. See 11 U.S.C. 1328(a)(2) (making those provisions applicable to Chapter 13 proceedings such as this one). As with student loan debt, those debts are not among the categories for which Section 523(c)(1) requires the creditor to object to discharge.

By rendering certain debts completely nondischargeable, those provisions reflect Congress's determination that the compelling societal interests in the

satisfaction of such obligations should take precedence over the debtor's interest in obtaining a fresh start in bankruptcy. The Ninth Circuit's analysis, however, invites debtors to attempt to escape liability for debts within those categories as well as for student loan debt (which can lawfully be discharged if the debtor initiates an adversary proceeding and the bankruptcy court makes an undue hardship finding). As here, the debtor could include language in a proposed bankruptcy plan stating that confirmation of the plan would extinguish the relevant debts. Then, if the creditor did not object and the plan was confirmed and subsequently completed, the debtor could argue that the debts had been discharged and that the discharge (though illegal) was not subject to later reexamination. In a prior decision, the Ninth Circuit acknowledged that possibility but stated only that it "d[id] not address any of the public policy concerns that might impact the dischargeability of such obligations as alimony or child support." *Great Lakes Higher Educ. Corp.* v. *Pardee (In re Pardee)*, 193 F.3d 1083, 1087 n.6 (1999). In contrast, no such difficulties arise if Section 523(a) is understood to limit the legal effect of a discharge order rather than to provide direction to bankruptcy courts about what plans to confirm.

c. On the facts of this case, it is particularly clear that petitioner's failure to take an appeal did not effect a forfeiture of its right to collect the unpaid portion of respondent's student loan debt after the completion of the plan. The discharge order entered in May 1997 expressly *excluded* "any debt * * * for a student loan" from the categories of debts being discharged. J.A. 46. A different bankruptcy judge subsequently concluded that this exclusion was a "clerical mistake," J.A. 48, and

the court of appeals accepted that characterization. It is at least equally plausible, however, that the bankruptcy court in issuing the discharge order recognized (perhaps belatedly) that, in the absence of an undue hardship finding, any unpaid student loan debt could not be discharged. In any event, petitioner's failure to appeal a discharge order that specifically excluded the debt at issue here cannot reasonably be viewed as a waiver of its right to pursue continued collection efforts.

d. The court of appeals relied (Pet. App. 35) on 11 U.S.C. 1327(a), which states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." The issue before the Court, however, does not involve whether the plan was binding on petitioner and respondent, since respondent does not contend that petitioner violated the plan's terms while it was in effect. Instead, the question here involves the legal effect of the discharge order that the bankruptcy court entered upon respondent's completion of the plan. With respect to that question, Section 523(a)(8), not Section 1327(a), is the controlling provision.

In any event, any possible tension between Section 523(a)(8) and Section 1327(a) is properly resolved by the "commonplace of statutory construction that the specific governs the general." *Morales* v. *TWA*, 504 U.S. 374, 384 (1992). Section 523(a)(8) is the more specific provision because it directly addresses the circumstances under which a bankruptcy court's discharge order discharges a particular type of presumptively nondischargeable debt. In contrast, Section 1327(a) prescribes the general effects of plan confirmation as be-

tween the debtor and creditor, and it does not address any limits on the legal effect of a bankruptcy court's discharge order.[8]

B. Permitting Discharge Of Student Loan Debt Without An Undue Hardship Finding Is Inconsistent With The Background And Purposes Of Section 523(a)(8)

Until 1977, student loans were dischargeable in bankruptcy on the same terms as other debts. See 11 U.S.C. 35 (1976) (listing non-dischargeable debts). Since then, Congress has acted repeatedly to restrict the discharge of student loan debt in bankruptcy. The history and purposes of those enactments confirm that a discharge order does not discharge a student loan debt unless the bankruptcy court finds that failure to do so will result in undue hardship to the debtor and his dependents.

1. In 1976, Congress enacted legislation "making it more difficult for debtors to discharge student loans guaranteed by States." *Hood*, 541 U.S. at 449. That statute provided that such debt "may be released by a discharge in bankruptcy * * * only if" (1) the loan had been outstanding for more than five years as of the discharge date, or (2) "the court in which the proceeding [was] pending determine[d] that payment from future income or other wealth w[ould] impose an undue hardship on the debtor or his dependents." Education

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[8] Neither the court of appeals nor respondent has relied upon Section 1327(b) or (c), which together provide that confirmation of a Chapter 13 plan generally "vests all of the property of the estate in the debtor" and does so "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. 1327(b)-(c). Like Section 1327(a), these provisions do not specifically address debts that are excepted from discharge by Section 523(a).

Amendments of 1976, Pub. L. No. 94-482, § 439A(a), 90 Stat. 2141.

In 1978, Congress replaced the Bankruptcy Act with the Bankruptcy Code, which contained a provision whose wording closely paralleled current Section 523(a)(8). That provision stated that "[a] discharge under" three specified sections of the Bankruptcy Code "d[id] not discharge an individual debtor from any debt * * * to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless" one of two conditions was met. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2590-2591. The first basis for discharge under the original Bankruptcy Code was that the "loan first became due before five years * * * before the date of the filing of the petition." 11 U.S.C. 523(a)(8)(A) (1982). The second basis was worded identically to current Section 523(a)(8): "unless * * * excepting such debt from discharge * * * will impose an undue hardship on the debtor and the debtor's dependents." *Ibid.*

Since 1978, Congress has consistently expanded the scope of non-dischargeability of student loan debt. In 1990, Congress extended Section 523(a)(8)'s restrictions to discharge orders entered under Section 1328(a), which governs discharges (like the one at issue here) entered following completion of a Chapter 13 plan. Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388-28. That same year, Congress also increased the required waiting period in the absence of undue hardship from five years to seven years. Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(1)-(2), 104 Stat. 4964-4965. In 1998, Congress eliminated the provision authorizing time-based discharge of student loan debt,

thus creating the current regime under which all discharges of such debt require an undue hardship finding. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837.[9]

2. The consistent direction of these changes and the reasons underlying them refute any suggestion that debtors can obtain a discharge of student loan debt without an undue hardship determination. "[S]tudent loans are enabling loans [that] allow[] individuals to improve their own human capital and increase their income potential." *Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1042 (10th Cir. 2007) (en banc) (internal quotation marks and citation omitted). Because the principal benefit of student loans—that is, an education—cannot be seized in the event of a default, policymakers feared that, without federal guarantees, "most lenders would * * * refuse to fund a student's pursuit of higher education." *Ibid.* (quoting Seth J. Gerson, *Separate Classifications of Student Loans in Chapter 13*, 73 Wash. U. L.Q. 269, 280 (1995)). As a result, the United States "insures or guarantees lenders and guarantors that the government will repay student loans in the event of a borrower's default." *Ibid.*

The current restrictions on dischargeability of student loan debt in bankruptcy thus serve two fundamental purposes. First, they "prevent[] abuses of the educational loan system by restricting the ability to discharge a student loan shortly after a student's graduation." 4 *Collier* ¶ 523.14[1], at 523-101 (June 2007). Second, they "safeguard[] the financial integrity of governmental

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[9] Because the bankruptcy court's discharge order was entered in 1997, see J.A. 47, the 1998 amendments are not directly applicable to this case. There is no dispute, however, that respondent was ineligible for a time-based discharge under the pre-1998 version of the statute.

entities and nonprofit institutions that participate in educational loan programs." *Ibid.*

Permitting debtors to discharge student loan debt without obtaining the undue hardship determination mandated by Section 523(a)(8) is inconsistent with both purposes. So long as the immediate creditor fails to object, the Ninth Circuit's approach would permit a debtor to obtain a binding discharge of student loan debt immediately upon his graduation and without any determination of undue hardship. Indeed, respondent appears to be precisely the sort of debtor for whom Congress did not intend to authorize a discharge of student loan debt. Respondent sought bankruptcy protection less than five years after he *obtained* his first student loan. Pet. App. 60-61. At the time he filed for bankruptcy, moreover, respondent was employed, J.A. 21, did not assert that he had any dependents, and identified no specific debts beyond his student loans, J.A. 7.

C. Treating An Undue Hardship Finding As A Precondition To Discharge Is Fair To Both Debtors And Creditors

1. Requiring a Chapter 13 debtor to "affirmatively secure[] a hardship determination" (*Hood*, 541 U.S. at 450) in order to discharge a student loan debt makes sense because, as a practical matter, student loan creditors cannot conduct a timely and thorough review of every Chapter 13 plan that they receive. See *Ruehle*, 412 F.3d at 681 (noting that student loan creditors "receive tidal waves of mail"). We are advised that Chapter 13 plans often are mailed only to payment service subcontractors, and that those subcontractors cannot practicably forward those plans promptly enough to permit timely scrutiny by knowledgeable staff members before the date of the confirmation hearing. See Fed. R.

Bankr. P. 2002(b) (providing that notice must be given "not less than 25 days" before the deadline for filing objections). And even when those staff members do timely receive Chapter 13 plans for review, thorough scrutiny of the plan may be impracticable because "there is no fixed form that [the] plan must take, and debtors are allowed to tailor their plans to meet their own needs and circumstances." 8 *Collier* ¶ 1322.01, at 1322-6 to 1322-6.1 (Sept. 2006). In contrast, the procedures for commencing an adversary proceeding are designed to ensure that the appropriate individuals receive prompt and effective notice of the debtor's intent to seek discharge of a presumptively non-dischargeable student loan debt. See, *e.g.*, Fed. R. Bankr. P. 7004(b)(3) (requiring service on "an officer, a managing or general agent, or * * * any other agent authorized by appointment or by law to receive service of process"); Fed. R. Bankr. P. 7008 (incorporating Federal Rule of Civil Procedure 8, and thus requiring that an adversary complaint contain "a short and plain statement of the claim" (Fed. R. Civ. P. 8(a)(2) and "a demand for the relief sought" (Fed. R. Civ. P. 8(a)(3)).

Requiring the debtor to seek an undue hardship determination will not necessitate lengthy or complicated proceedings. A creditor may choose not to contest undue hardship once the issue properly is raised if it concludes that such a finding is warranted or that the costs of contesting the existence of undue hardship would exceed the benefits. Cf. 34 C.F.R. 682.402(i)(1)(iii) (Department of Education regulation permitting, but not requiring, a guaranty agency to refrain from opposing an undue hardship determination if it concludes that "the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the

loan"). The Federal Rules of Bankruptcy Procedure do not forbid stipulations, and they expressly authorize requests for admission, Fed. R. Bankr. P. 7036, default judgments, Fed. R. Bankr. P. 7055, and summary judgment, Fed. R. Bankr. P. 7056. Although the bankruptcy court must make an explicit undue hardship finding to discharge student loan debt even if the creditor does not object (see p. 16, *supra*), that finding can be made expeditiously.

2. The conclusion that debtors may not discharge a student loan debt simply by including language in a proposed Chapter 13 plan also avoids creating ethical difficulties for debtors' attorneys. As this Court stated in *Hood*, the Bankruptcy Rules "require[] the debtor to file an 'adversary proceeding' against [a creditor] in order to discharge his student loan debt," and the Bankruptcy Code provides that a "Bankruptcy Court cannot discharge [such a] debt without making an undue hardship determination." 541 U.S. at 451, 453-454.

The Ninth Circuit's approach encourages debtors' attorneys to seek to evade both of those requirements by including "plainly illegal provision[s]" in bankruptcy plans. *Ruehle*, 412 F.3d at 681. Doing so, however, would implicate Federal Rule of Bankruptcy Procedure 9011(b)(2), which states that, by presenting a document to a bankruptcy court, an attorney certifies that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." In addition, the approach approved by the court of appeals depends for its success on the prospect that the bankruptcy court will not become aware of the illegal provisions in time to perform its independent duty to confirm only those plans that "compl[y] with the provi-

sions of" the Bankruptcy Code. 11 U.S.C. 1325(a)(1); see *Johnson* v. *Home State Bank*, 501 U.S. 78, 87 (1991) (stating that "[a] bankruptcy court is authorized to confirm a [Chapter 13] plan *only* if the court finds" that it complies with the requirements set forth in Section 1325(a)) (emphasis added). The Bankruptcy Code should not be construed to encourage "practice by ambush." *Whelton* v. *Educational Credit Mgmt. Corp.*, 432 F.3d 150, 153 (2d Cir. 2005) (citation omitted).

3. The principle that "student loan debt remains due until there is a determination that the loan is dischargeable," 4 *Collier* ¶ 523.14[2], at 523-102, is fair to the debtor's other creditors and to the debtor himself. Because a debtor does not receive a discharge under Chapter 13 until after performance under the plan is complete, 11 U.S.C. 1328(a), a subsequent determination that the discharge order did not effectively discharge the debtor's student loan debt will not affect payments made under the plan to other creditors. The Bankruptcy Code, moreover, imposes no time limit within which an undue hardship determination must be made. Accordingly, a debtor who legitimately qualifies for a discharge of student loan debt but has failed to secure the necessary hardship determination need only do what he should have done in the first place: return to the bankruptcy court and commence an adversary proceeding. See Pet. App. 60 (district court remanding to the bankruptcy court for an undue-hardship determination). In contrast, a debtor who cannot demonstrate undue hardship is prevented from obtaining a windfall to which he is not entitled.

D. Because Respondent Did Not Initiate The Appropriate Procedure For Securing An Undue Hardship Finding And The Bankruptcy Court Made No Such Finding In This Case, Respondent's Student Loan Debt Has Not Been Discharged And The Court Need Not Address The Constitutional Question Presented In The Petition

This Court need not address petitioner's additional contention (Br. 51-58) that the notice it received of respondent's Chapter 13 plan failed to satisfy constitutional due process requirements. Consistent with the Constitution, Congress could have included student loan debt among the debts listed in Section 523(c)(1), for which a creditor must either raise or forfeit its objection to dischargeability. See p. 13 & n.3, *supra*. Had Congress done so, it also could have provided that mailing a student loan creditor notice of a proposed plan at an appropriate address is sufficient to trigger the creditor's duty to contest discharge. See *Jones* v. *Flowers*, 547 U.S. 220, 225-226 (2006) (stating that "due process does not require actual notice" and noting "this Court's ample precedent condoning notice by mail"). Thus, the procedural regime that effectively results from the court of appeals' ruling here would raise no substantial constitutional concerns if Congress had enacted it into law, thereby giving student loan creditors fair warning of the steps needed to preserve their rights to payment.

As explained above, however, the Bankruptcy Code does not require creditors to object to the debtor's plan to preserve the non-dischargeability of student loan debt, but rather places upon student loan debtors an affirmative duty to secure an undue hardship finding as a prerequisite to discharge. In addition, the Bankruptcy Rules require a particular type of notice (service of an

adversary complaint upon specified agents of the creditor) in order to commence proceedings to adjudicate the dischargeability of a student loan debt, and they provide that a creditor's obligation to respond within the context of such a proceeding does not arise until a complaint "is duly served." Fed. R. Bankr. P. 7012(a). The Code and Rules thus assure student loan creditors that their right to full payment will not be placed at issue unless and until the creditor is informed, in compliance with the Rules' heightened notice requirement, that the debtor has sought an undue hardship finding. The gravamen of petitioner's constitutional challenge is that respondent's failure to initiate an adversary proceeding as required by the Code and Rules deprived petitioner of the process it was due. See Pet. Br. 54-55.

The Code and Rule provisions on which petitioner relies make clear, however, that petitioner did not waive its right to pursue continued collection efforts by failing to insist on an adversary proceeding. See pp. 13-16, *supra*. And under Section 523(a)(8), the proceedings in the bankruptcy court did not effect a discharge of respondent's unpaid student loan debt. See pp. 17-23, *supra*. It is therefore unnecessary for the Court to decide whether petitioner would have suffered a deprivation of constitutional magnitude if its right to seek further repayment had been abrogated without the notice and procedures that the Code and Rules require for a discharge of student loan debt.

This Court's usual practice is to avoid deciding constitutional questions whenever possible, see, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2508, 2513 (2009), and there is no reason to depart from that practice here. To the contrary, withholding decision on any constitutional issue would be

particularly appropriate because of the atypical facts of this case. It is undisputed that petitioner's litigation department received *actual* notice of respondent's Chapter 13 plan, the deadline for filing objections, and the date of the confirmation hearing. Pet. App. 21; see J.A. 34. In many other cases, however, it will not be possible to show that the creditor received actual notice. See pp. 26-27, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-1134

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IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

—v.—

FRANCISCO J. ESPINOSA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF RESPONDENT FOR AMICI CURIAE PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, KENNETH N. KLEE, GEORGE W. KUNEY, JONATHAN C. LIPSON, LOIS LUPICA, RALPH R. MABEY, C. SCOTT PRYOR, MICHAEL D. SOUSA, AND ROBERT M. ZINMAN

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] They are deeply interested in the outcome of this appeal, not only for its effect on debt restructuring cases under chapter 13 of the Bankruptcy Code,[3] but also because of its potential impact on cases for reorganization under chapters 9, 11 and 12 of the Bankruptcy Code. The *Amici* file this brief in order to underscore the fundamental importance for both debtors and the creditor body to uphold the finality of confirmation orders under chapters 9, 11, 12, and 13, and to bar attacks upon such orders by creditors who choose not to object

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[1] The *Amici* file this brief with the written consent of all parties. No counsel for a party has authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] The *Amici* are Richard Aaron, Professor of Law at University of Utah-S.J.Quinney College of Law; Jagdeep S. Bhandari, Professor of Law at Florida Coastal Law School; Susan Block-Lieb, Professor of Law at Fordham Law School; Robert D'Agostino, Professor of Law at John Marshall Law School; Kenneth N. Klee, Professor of Law at UCLA School of Law; George W. Kuney, Professor of Law at University of Tennessee College of Law; Jonathan C. Lipson, Professor of Law at Temple University-James E. Beasley School of Law; Lois Lupica, Professor of Law at University of Maine School of Law; Ralph R. Mabey, Professor of Law at University of Utah-S.J.Quinney College of Law; C. Scott Pryor, Professor of Law at Regent University School of Law; Michael D. Sousa, Professor of Law at University of Denver-Sturm College of Law; and Robert M. Zinman, Professor of Law at St. John's University School of Law.

[3] Title 11 of the United States Code is hereinafter referred to as the Bankruptcy Code.

to them during proceedings for confirmation, whether the subsequent challenge to the confirmation order is based on subject matter jurisdictional or substantive bankruptcy law claims.

The *Amici* support the Respondent's analysis upholding the confirmation order and the Respondent's discharge of student loan debt, and offer additional grounds in support of that result. They urge that the Court's holding four months ago in *Travelers Indemnity Company v. Bailey*, ___ U.S. ___, 129 S.Ct. 2195, 2205 (2009), is controlling. There, the Court held that the doctrine of *res judicata* barred creditors in a subsequent proceeding in the same reorganization case from challenging an earlier confirmation order, and ruled that provisions of a confirmation order could not be later attacked, whether or not the order constituted a proper exercise of bankruptcy court jurisdiction or of its substantive bankruptcy law power. The *Amici* urge the Court to hold that a creditor who chooses to remain silent at the confirmation stage after receiving adequate notice that a proposed chapter 13 plan will discharge student loan debt, is barred by *res judicata* from challenging the confirmation order in a later proceeding in the same bankruptcy case.

SUMMARY OF ARGUMENT

The *Amici* urge two independent bases for upholding the confirmation order and discharge at issue:

First: A collateral attack on a confirmation order is barred by *res judicata* even if it is predicated either on a claimed lack of subject matter jurisdiction or of substantive power of the bankruptcy

court. Such a post-confirmation collateral challenge is barred, whether made in the same bankruptcy case or in another case. Moreover, the *Amici* urge that §§ 523(a)(8) and 1328(a)(2) of the Bankruptcy Code (the "Student Loan Provisions") and F. R. Bankr. P. 7001(6) are not jurisdictional in nature, and that the violation of or non-compliance with those provisions does not void an order.

Second: By reason of Bankruptcy Code § 1327(a), each creditor is bound by the discharge provision of a confirmation order to which it did not object after receiving adequate notice of the proposed plan and an opportunity to assert its objection to such provision.

1. *Summary of the res judicata argument*: The doctrine of *res judicata* applies in a subsequent proceeding in the same bankruptcy case. Each of the elements for applicability of the doctrine of *res judicata* is satisfied in this case. Petitioner was served with adequate notice of the confirmation proceeding and of the proposed plan's provision for the discharge of student loan debt, and thereby became a party to that proceeding. It had a full opportunity for a hearing on any objection to confirmation that it might interpose. Bankruptcy Code § 1324(a); F. R. Bankr. P. 2002(b). Moreover, Petitioner was expressly warned that its rights could be impaired by the proposed plan. Nevertheless, it failed to object to confirmation or to appeal from the order confirming the plan. As such, the confirmation order became final and binding on all parties under Bankruptcy Code § 1327(a). Petitioner was thus barred by *res judicata* from raising its claims in Respondent's post-confirmation proceeding to confirm his discharge.

Res judicata is a foundational doctrine of the law, designed to provide certainty for the parties and reliability for the judicial system. The doctrine is of prime importance not only in chapter 13 debt restructuring cases, but also in bankruptcy reorganization cases under chapters 9, 11 and 12. Once a plan has been confirmed, a creditor who receives adequate notice of the confirmation hearing but chooses not to object to confirmation or to appeal the confirmation order, is barred by *res judicata* from attacking the confirmation order on any ground, whether the challenge is based on an asserted lack of subject matter jurisdiction or substantive power of the bankruptcy court. These principles were made clear by the Court in *Travelers v. Bailey*, which the *Amici* urge is controlling. Under the Court's holding in that case, Petitioner's attack on the confirmation order must fail.

In *Travelers v. Bailey*, the Court held that a creditor was barred by *res judicata* from challenging a confirmation order in a post-confirmation proceeding in the same bankruptcy case. Although the doctrine of *res judicata* has long been applied to bar a subsequent challenge asserted in a different case, *Travelers v. Bailey* applied the doctrine to an attack on a confirmation order made in a proceeding in the same bankruptcy case in which the confirmation order had been issued. As ruled by *Travelers v. Bailey*, all attacks, whether made by a post-confirmation proceeding filed in the same bankruptcy case or in a different case in a non-bankruptcy court, constitute collateral attacks made impermissible by the doctrine of *res judicata*. The Court made clear in that case that the basic reason for the doctrine is to provide finality for confirmation orders.

Travelers v. Bailey, moreover, also makes clear that the doctrine of *res judicata* applies to bar all claims, whether based on an asserted lack of jurisdiction for a provision of the confirmation order or a lack of substantive power of the bankruptcy court. Thus, even if the Student Loan Provisions were viewed as jurisdictional or beyond the power of the bankruptcy court, which *Amici* believe they are not, *res judicata* precludes a challenge to a confirmation order based on them. Petitioner's fundamental position on this appeal never comes to grips with the impact of *res judicata*, and does not address or even cite the Court's decision in *Travelers v. Bailey*.

Petitioner also argues that the bankruptcy court lacked the jurisdiction to confirm a plan for discharge of student loan debt without an undue hardship determination made in an adversary proceeding pursuant to F. R. Bankr. P. 7001(6). That contention is likewise flawed because that provision cannot be viewed as jurisdictional in nature in light of decisions of this Court and F. R. Bankr. P. 9030.

2. *Summary of the argument based on § 1327(a).* Independent of the bar of *res judicata*, the *Amici* urge that a challenge to a discharge of a student loan debt provided for by a confirmed chapter 13 plan cannot be made because of § 1327(a) of the Bankruptcy Code. Section 1327(a), like its analogue in chapters 9, 11 and 12 (set forth in Bankruptcy Code §§ 944(a), 1141(a), and 1227(a)), states that, "the provisions of a confirmed plan . . . bind . . . each creditor, . . . whether or not such creditor has objected to . . . the plan." The plain text of § 1327(a) should be applied as written. Congress has been both clear and emphatic in the language it chose for § 1327(a) to make all provisions of a confirmed plan

binding on each creditor. To allow a creditor's post-confirmation attack on the confirmation order would require the Court to disregard that statute. That statute makes no exception for provisions of any type. Thus, no provision of a confirmed plan may be attacked by a creditor after confirmation if the creditor has not objected to the plan proposed for confirmation or appealed the confirmation order.

POINT I

PETITIONER'S CLAIM IS BARRED BY *RES JUDICATA*, WHICH PRECLUDES A CHALLENGE TO A CONFIRMATION ORDER IN A POST-CONFIRMATION PROCEEDING IN THE SAME BANKRUPTCY CASE

The doctrine of *res judicata* bars all post-confirmation objections to a confirmed plan. The Court left no doubt about the total bar of the doctrine of *res judicata* by its broad and unqualified language in *Travelers v. Bailey*, 129 S.Ct. 2195, decided scarcely four months ago. *Travelers v. Bailey* is controlling.

A. Travelers v. Bailey Bars Collateral Attack of Confirmation Orders in the Same Bankruptcy Case

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). A bankruptcy court's order confirming a plan of reorganization is a final order entitled to *res judicata* effect. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72

(1938). *Res judicata* precludes a collateral attack upon a confirmation order even when the bankruptcy court entering the order lacked subject matter jurisdiction to do so. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940).

The Court's prohibition on the collateral attack of confirmation orders has usually arisen in response to post-confirmation objections raised outside the debtor's bankruptcy case in an action brought in a non-bankruptcy court. *See e.g., Stoll v. Gottlieb*, 305 U.S. 165 (applying *res judicata* to preclude collateral attack of confirmation order in Illinois state court action); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (applying *res judicata* to preclude collateral attack of confirmation order in United States district court). In *Travelers v. Bailey*, the Court held that *res judicata* also precludes collateral attack upon a confirmation order in a later proceeding in the *same* bankruptcy case. *Travelers v. Bailey*, 129 S.Ct. at 2206.

The circumstances in the present case regarding *res judicata* mirror those in *Travelers v. Bailey*. In *Travelers v. Bailey*, the Court granted *certiorari* to review whether the Court of Appeals had erroneously held, in a post-confirmation proceeding in the chapter 11 bankruptcy case of Johns-Manville Corporation, that the bankruptcy court did not have subject matter jurisdiction to issue a confirmation order enjoining the prosecution of claims against non-debtors that did not directly affect the *res* of the bankruptcy estate.

The Court, however, did not decide the issue for which it had granted *certiorari* in that case. *Travelers v. Bailey*, 129 S. Ct. at 2207. Instead, the Court determined the appeal on the basis of the paramount

importance of the doctrine of *res judicata*, holding that *res judicata* barred the post-confirmation attack in Manville's bankruptcy case on the injunction included in the confirmation order. In the present case, *certiorari* was granted to review whether a chapter 13 confirmation order erroneously confirmed a plan that provided for the discharge of student loan debt without a determination of undue hardship, and to consider a related notice issue. Here, as in *Travelers v. Bailey*, the attack on the confirmation order was made in a subsequent proceeding in the bankruptcy case. As in *Travelers v. Bailey*, the Court in the present case should not address the substantive issue it accepted for review, but instead should bar Petitioner's attack on the confirmation order on the basis of *res judicata*.

In *Travelers v. Bailey*, a plan of reorganization providing for the treatment of massive asbestos related personal injury claims, was confirmed. Years after confirmation of Manville's plan of reorganization, certain asbestos-injured claimants brought lawsuits in state courts across the country against Petitioner, who was Manville's insurer. Petitioner then brought a proceeding within Manville's bankruptcy case for an interpretation that the injunctive provision built into the confirmation order was intended to bar those lawsuits. The Court of Appeals for the Second Circuit held that the bankruptcy court lacked subject matter jurisdiction to grant the injunction.

The Court reversed. Under the Court's ruling, it did not matter whether or not the bankruptcy court lacked subject latter jurisdiction or power to issue the order, holding that under either circumstance the later attack on the order in the same bankruptcy

case was barred by *res judicata*. The Court made it crystal clear that *res judicata* bars all post-confirmation challenges to confirmation orders. As stated by the Court: "[O]nce the 1986 orders became final on direct review (*whether or not [they were] proper exercises of bankruptcy court jurisdiction and power*), they became *res judicata*," and the Court barred the assertion of any matter that could have been raised in the proceeding for confirmation in opposition to the provision in question. *Travelers v. Bailey*, 129 S. Ct at 2205 (emphasis added). The Court went on to state:

> So long as respondents or those in privity with them were parties to the Manville bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction [to issue the injunction incorporated into the confirmation order], they cannot challenge it now [in the subsequent proceeding for an interpretation of the scope of that provision] by resisting enforcement of the 1986 Orders.

Id. at 2206.

The Court's broad view of *res judicata* and its importance is unmistakably clear:

> The willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with *res judicata* and the practical necessity served by that rule.

Id. at 2206 (citing, *inter alia*, *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1308 (11th Cir. 2005) (barring collateral attack of confirmation order in later proceeding in same bankruptcy case and noting that if "courts could evaluate the jurisdiction

that they may or may not have had to issue a final judgment, the rules of *res judicata* . . . would be entirely short-circuited.")).

Like the unsuccessful respondents in *Travelers v. Bailey*, Petitioner in the present case seeks to attack a confirmation order in a subsequent proceeding in the same bankruptcy case, essentially claiming a lack of jurisdiction. Even if jurisdiction were lacking, *Travelers v. Bailey* is controlling to bar Petitioner's attack. *See Travelers v. Bailey, 129* S. Ct. at 2206 ("[T]his sort of collateral attack cannot be squared with *res judicata* . . . .").

The fact that Respondent commenced the instant proceedings by reopening the chapter 13 case in order to bring his proceeding to reconfirm the discharge of his student loan debt does not change the impermissible nature of Petitioner's attack on the confirmation order. *See id.* at 2206 n.7 ("Respondents point out that it is *Travelers*, not they, who moved the Bankruptcy Court to enforce the 1986 Orders. But who began the present proceedings has no bearing on the application of *res judicata* . . . .."). Based on a straightforward application of *Travelers v. Bailey*, Petitioner's post-confirmation attack on the confirmation order is barred by the doctrine of *res judicata*.

B. The Finality of Confirmed Plans Ensures the Efficient Administration of the Bankruptcy Process

The finality of confirmed plans and the prohibition on their collateral attack reflects a strong policy in favor of bringing an end to litigation. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) ("[T]he practical concern with providing an end to litigation

justifies a rule preventing collateral attack on subject-matter jurisdiction"); *Stoll v. Gottlieb*, 305 U.S. at 172 ("It is just as important that there should be a place to end as that there should be a place to begin litigation."); *see also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. at 401 (overturning Ninth Circuit anti-trust decision for failure to apply *res judicata* and noting that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts . . . .") (citing *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917) (internal quotation marks omitted)).

The finality of confirmed plans is just as important in chapter 13 cases as it is in epic asbestos cases like that at issue in *Travelers v. Bailey*. The sound administration of the bankruptcy law requires that the provisions of plans of reorganization and for debt adjustment be immune from challenge once the plan has been confirmed and the appeal period has expired. When such plans have been confirmed without objection, the debtor and creditors must be able to rely on their finality. Confirmation orders are at the heart of reorganization and debt adjustment bankruptcy cases, and the bankruptcy system could not function if a confirmation order could be upset in a later proceeding. Credit is extended to the reorganized debtor and other relationships are formed in reliance on the finality of confirmation orders. Parties to debt adjustment and reorganization cases must be confident that their conduct in reliance on court-ordered confirmation will not be undercut by later attacks on the confirmed plan.

POINT II

EVEN IF *RES JUDICATA* WERE HELD NOT TO BAR AN ATTACK ON A PROVISION OF A CONFIRMATION ORDER FOR LACK OF JURISDICTION OR SUBSTANTIVE POWER OF A BANKRUPTCY COURT, THE STUDENT LOAN PROVISIONS AND F. R. BANKR. P. 7001(6) ARE NON-JURISDICTIONAL AND DO NOT VOID THE ORDER. A CREDITOR FORFEITS NON-JURISDICTIONAL OBJECTIONS BY NOT RAISING THEM AT THE CONFIRMATION STAGE, AND THUS CANNOT RAISE THEM THEREAFTER

Petitioner contends that the order providing for the discharge of Respondent's student loan debt is void. Petr's Br. 31-32. To support its "voidness" claim, Petitioner asserts that the bankruptcy court lacked the power to enter a confirmation order with a provision for the discharge of student loan debt in contravention of §§ 523(a)(8) and 1328(a)(2) and F. R. Bankr. P. 7001(6). As demonstrated in Point I, *res judicata* bars a challenge to a confirmation order for lack of subject matter jurisdiction or substantive power of the bankruptcy court. Because a confirmation order is made fully effective by the doctrine of *res judicata* despite a lack of subject matter jurisdiction, it obviously cannot be "void." Moreover, if a collateral attack upon a confirmation order cannot be based on a claimed lack of subject matter jurisdiction, then such an attack surely cannot be sustained on the basis of non-jurisdictional errors of law in the issuance of such an order. In that regard, §§ 523(a)(8) and 1328(a)(2) and F. R. Bankr. P. 7001(6) are non-jurisdictional in nature. They are

substantive and procedural bankruptcy law provisions, noncompliance with which does not render an order void. It is fundamental that the remedy to correct an error of law is to object and appeal if necessary.

Title 28 of the United States Code provides the bankruptcy courts, by referral from the district courts, with jurisdiction to enter confirmation orders and grant discharges. 28 U.S.C. § 157(a) and § 1334(b). Sections 523(a)(8) and 1328(a)(2) do not limit the scope of the bankruptcy court's jurisdiction. Those statutes are not jurisdictional under the governing test provided by the Court in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). To be jurisdictional under the *Arbaugh* test, a statute must itself clearly manifest Congressional intent to implicate the subject matter jurisdiction of the court. Furthermore, F. R. Bankr. P. 7001(6) is a non-jurisdictional claims processing rule under the Court's decision in *Kontrick v. Ryan*, 540 U.S. 443 (2004).

In the present case, the bankruptcy court had jurisdiction to enter a confirmation order, including its arguably erroneous provision for the discharge of student loan debt. Neither the Student Loan Provisions nor F. R. Bankr. P. 7001(6) abrogate that jurisdiction. Because the bankruptcy court had subject matter jurisdiction to issue the confirmation order, that order cannot be considered to be void, and thus is not subject to an attack predicated on F. R. Civ. P. 60(b)(4). Any interest Petitioner had in avoiding the provision for the discharge of its claim set forth in the confirmed plan is overridden by the need for finality and repose expressed in the doctrine of *res judicata*, as well as by § 1327 of the Bankruptcy

Code and the Court's decisions in *Kontrick v. Ryan* and *Arbaugh*.

A. The Student Loan Provisions of §§ 523(a)(8) and 1328(a)(2) Are Not Jurisdictional In Light of the "Readily Administrable Bright Line" Test Set Forth In *Arbaugh v. Y & H Corp.*, Requiring That To Be Jurisdictional A Statute Must, By Its Own Text, Clearly Evidence Congress' Intent To Implicate the Bankruptcy Court's Subject Matter Jurisdiction

Sections 523(a)(8) and 1328(a)(2) of the Bankruptcy Code are not jurisdictional under the test delineated by the Court in *Arbaugh v. Y & H Corp.*, 546 U.S. at 515-516, as applied by the Eleventh Circuit in *In re Trusted Net Media Holdings*, 550 F.3d 1035, 1039 (11th Cir. 2008). In determining the jurisdictional nature of a statute, the Court instructed the lower courts in the following manner:

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.

Arbaugh, 546 U.S. 500, 515-516 (emphasis added) (citations omitted). The Court has called this approach a "readily administrable bright line" test. *Id.* at 516.

Petitioner's argument that the bankruptcy court lacked jurisdiction to confirm a plan for the discharge of student loan debt, is flawed. It is predi-

cated on Petitioner's erroneous reliance on cases which pre-date *Arbaugh*, except for one case, *In re Mersmann*, 505 F.3d 1033 (10th Cir. 2007), which failed to apply or even cite *Arbaugh*. *See* Petr's Br. 31-32. Instead, under the "readily administrable bright line" test, the Student Loan Provisions are not jurisdictional because Congress did not "clearly state" that they were jurisdictional in nature.

A brief discussion of the jurisdiction of bankruptcy courts is warranted in order to fully understand the scope of their power. Similar to the other provisions in the Bankruptcy Code, §§ 523(a)(8) and 1328(a)(2) are substantive law provisions for bankruptcy cases. However, the subject matter jurisdiction of the bankruptcy courts is governed by 28 U.S.C. § 1334, not by the Bankruptcy Code codified by Title 11. *In re Trusted Net Media Holdings*, 550 F.3d at 1039 (citing *Kontrick v. Ryan*, 540 U.S. at 453). Title 28 provides that the "district courts shall have original and exclusive jurisdiction of all *cases* under title 11 [Bankruptcy Code]," and "original but not exclusive jurisdiction of all civil *proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b) (emphasis added)). Pursuant to §§ 151 and 157 of Title 28, bankruptcy court jurisdiction to adjudicate "core proceedings" exists by reference from the district courts to the bankruptcy judges for the district, including "core" jurisdiction for "confirmations of plans" and "objections to discharges." 28 U.S.C. § 157(b)(2)(J), (L). The Student Loan Provisions and F. R. Bankr. P. 7001(6), however, do not abrogate such jurisdiction of the bankruptcy courts because the "clearly states" requirement of *Arbaugh* is absent from those provisions. Indeed, those provisions contain *no* language suggesting that Congress

intended them to be jurisdictional. They thus are not jurisdictional in nature.

The issue in *Arbaugh* was whether Title VII's requirements that an employer have fifteen or more employees affected subject matter jurisdiction or, instead, related only to the substantive adequacy of a Title VII plaintiff's claim for relief, and thus could not be raised for the first time post-trial. *Arbaugh*, 546 U.S. at 503-04. The Court held that "the threshold number of employees for application of Title VII is an *element* of a plaintiff's claim for relief, not a jurisdictional issue." *Id.* at 515 (emphasis added). The Court reasoned that the "15-employee threshold" requirement did not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 510 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Therefore, defendant forfeited his right to object on the basis of this defense and could not raise the issue after the entry of judgment. *Arbaugh*, 546 U.S. at 510.

Following the Supreme Court's decision in *Arbaugh*, the Eleventh Circuit, in *Trusted Net Media Holdings*, followed the "readily administrable bright line" test to determine whether provisions in the Bankruptcy Code are jurisdictional. The court in *In re Trusted Net Media Holdings* considered whether the number of creditors and the amounts of claims of creditors required to file an involuntary petition under § 303(b) was jurisdictional or were elements simply constituting " 'substantive matters which must be proved or waived for petitioning creditors to prevail in involuntary proceedings.' " *In re Trusted Net Media Holdings*, 550 F.3d at 1041 (quoting *Rubin v. Belo Broad. Corp.*, 769 F.2d 611, 614 n.

3 (9th Cir. 1985)). The Court held that § 303(b) is not jurisdictional because Congress did not include jurisdictional language in the statute and that there was no congressional intent to implicate the bankruptcy court's subject matter jurisdiction. *In re Trusted Net Media Holdings*, 550 F.3d at 1043. Further, § 303(b) never makes an explicit or implicit reference to its requirements being jurisdictional and never used the word "jurisdiction." *Id.* Rather, the Court explained that the Bankruptcy Code provision at issue merely states that a case "is commenced against a person by the filing with the bankruptcy court of a petition under chapter 7 or 11" by the requisite number of persons holding the requisite claims. *Id.*

In sum, under the reasoning set forth in *In re Trusted Net Media Holdings*, which applied the *Arbaugh* test, the Student Loan Provisions are not jurisdictional for a number of reasons. First, Congress did not "clearly state" any words constituting jurisdictional language in §§ 523(a)(8) and 1328(a)(2). Further, under *Trusted Net*'s analysis, the "undue hardship" requirement in the Student Loan Provisions is an *element* that merely relates to substantive matters which must be proved, and an objection based on a lack of such proof is forfeited by a failure to make it at the confirmation stage. *Id.* at 1041. The Bankruptcy Code creates the substantive rights and obligations of both debtors and creditors, and in this case, Petitioner *forfeited its rights* under the Student Loan Provisions. *See, e.g., In re Trusted Net Media Holdings*, 550 F.3d at 1041; *see also* Point II. B *infra*.

Moreover, *In re Trusted Net Media Holdings* is not cited in Petitioner's brief even though it is a Cir-

cuit Court case that applies the Court's test in *Arbaugh*, and a leading treatise states that the "better view" is that Bankruptcy Code provisions are not jurisdictional. *See* 5 COLLIER ON BANKRUPTCY, ¶ 546.02[4] (Allen N. Resnick et al. 15th ed. rev. 2006) (stating that the "better view" is that § 546(a) is non-jurisdictional); 2 COLLIER ON BANKRUPTCY, ¶ 303.08[2] (stating that the better argument is that § 303(b) may be waived; and ¶ 303.02 (stating that § 109(a)'s requirements for a person to be a debtor under the Bankruptcy Code, may be waived) (Allen N. Resnick et al. 16th ed. (2009). Further, Petitioner's brief does not even mention *Arbaugh*.

In enacting the Student Loan Provisions, Congress merely indicated that in order for a student debt to be dischargeable, undue hardship should be proven, and that *a manner* in which it is demonstrated is by commencing an adversary proceeding. However, there is no language in the Bankruptcy Code which makes such a procedure jurisdictional and mandatory, nor anything which precludes a forfeiture of the right to object based on the failure to bring an adversary proceeding. *See* 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, § 346.1, at 346-33 (3d ed. 2000 & Supp. 2004) (citing *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 453-54 (2004)).

It is clear that the Student Loan Provisions are not jurisdictional, and Petitioner forfeited its rights thereunder by not asserting them at the confirmation stage.

B. F. R. Bankr. P. 7001(6) is a Non-Jurisdictional Claims Processing Rule Under the Court's Decision in *Kontrick v. Ryan*

Nothing in F. R. Bankr. P. 7001(6) implicates the jurisdiction of the bankruptcy courts. Non-compli-

ance with Rule 7001(6) does not void a judgment or order. As discussed in Section II. A, Congress conferred jurisdiction on the bankruptcy courts over proceedings for confirmation of plans and discharges of debts under §§ 1334(b), 157(b)(1)(J),(L) of Title 28 of the United States Code. F. R. Bankr. P. 9030 prevents the Bankruptcy Rules from being construed to expand or limit the jurisdiction of the bankruptcy courts. The confirmation order for the discharge of Petitioner's student loan debt was not void because entry of the order was within the subject-matter jurisdiction of the bankruptcy court as prescribed by Congress.

The Court recently underscored the non-jurisdictional nature of the Bankruptcy Rules in *Kontrick v. Ryan*, 540 U.S. at 447. The Court there noted that courts have been "less than meticulous" in their characterization of rules as "jurisdictional," and reaffirmed that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452-53. Procedural rules promulgated by the Court for bankruptcy cases, on the other hand, are claims processing rules which "shall not be construed to extend or limit the jurisdiction of the courts." *Id.* at 453-54 (quoting F. R. Bankr. P. 9030). These claims processing rules, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, *Id.* at 444-45. The Court concluded that F. R. Bankr. P. 4004 was a non-jurisdictional claims-processing rule "adopted by the Court for the orderly transaction of its business . . . ." 540 U.S. at 447, 454; *see also Schacht v. United States*, 398 U.S. 58, 64 (1970) ("[T]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional").

Petitioner's argument that F. R. Bankr. P. 7001(6) requires an adversary proceeding to discharge student loans under § 523(a)(8) fails to account for the claims-processing nature of procedural rules. An adversary proceeding is not required by statute or the Constitution for discharge of student loan debts. *Hood*, 541 U.S. at 453-54. To hold that Rule 7001(6) is a jurisdictional requirement, would require the Court to ignore the scope of the authority conferred by Congress by 28 U.S.C. § 2075, which only authorizes the promulgation of rules of "practice and procedure" for bankruptcy cases. It would also require the Court to disregard the plain language of F. R. Bankr. P. 9030, which precludes interpreting Rule 7001(6) as a limitation on the jurisdiction of the bankruptcy courts.

Petitioner failed to object to Respondent's chapter 13 plan despite receiving notice of the plan confirmation hearing and notice of the treatment of its claim under the plan. Under *Kontrick v. Ryan*, by this failure to object, Petitioner forfeited its right to a determination of undue hardship in an adversary proceeding under F. R. Bankr. P. 7001(6). Because Rule 7001(6) is non-jurisdictional in nature, there is no basis for a claim that noncompliance with it voided the confirmation order and discharge.

C. Concepts of Finality and Repose Dictate that a Creditor Who Fails To Object Prior to Confirmation of a Chapter 13 Plan Forfeits Its Right To Later Object That the Plan Was Erroneously Confirmed

The Bankruptcy Code and Bankruptcy Rules governing objections to confirmation of a chapter 13 plan act as claims-processing limitations. *See*

Bankruptcy Code § 1324; F. R. Bankr. P. 2002(b), 3015(d), (f), 9014. Section 1324(a) provides that, "after notice, the court shall hold a hearing on confirmation of the plan." A creditor, as a party in interest under § 1324, may object to the confirmation. F. R. Bankr. P. 2002 requires that "the debtor, the trustee, all creditors and indenture trustees [receive] not less than 25 days notice by mail of the time fixed . . . for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." F. R. Bankr. P. 3015(d) provides that "[a]n objection to confirmation of a plan shall be filed . . . *before* confirmation of the plan." (emphasis added). F. R. Bankr. P. 2002(b) and 3015(f) are claims-processing rules. *See Kontrick v. Ryan*, 540 U.S. at 454 ("In short, the filing deadlines proscribed in [the] Bankruptcy Rules . . . are claims-processing rules.").

In the case at bar, compliance with this requirement was exceeded because Petitioner received more than the required 25 days notice that it had a right to be heard. Petitioner did not object before the confirmation of Respondent's plan, nor take an appeal from the confirmation order.

Petitioner forfeited its right to object to the confirmed plan once it was confirmed and the time to appeal from the confirmation order expired without an appeal having been taken. This Court has held that a creditor who fails to assert its rights within the time constraints prescribed by the Bankruptcy Rules forfeits its right to later argue that the bankruptcy court's decision was erroneous. *See Kontrick v. Ryan*, 540 U.S. at 459 ("Ordinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if it is not [raised]."); *see also Eber-*

hart v. United States, 546 U.S. 12, 19 (2006) ("[C]laims-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them."). Here, Petitioner failed to file any objection to the confirmation of Respondent's chapter 13 plan or to appeal the confirmation order. Therefore, Petitioner forfeited its objection that §§ 523(a)(8) and 1328(a)(2) prohibit a plan from discharging student loan debt without a determination of undue hardship. Petitioner likewise forfeited its rights under F. R. Bankr. P. 7001(6).

Finally, under the principle of repose, this Court should recognize the finality of confirmation of plans of reorganization and of debt adjustment. "Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the faculties for litigation." *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U.S. 333, 343 (1860); CHARLES A. WRIGHT, ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE, § 4403 (3d ed. 1998) ("Repose is the most important product of *res judicata*."). The time limitation provision found in F. R. Bankr. P. 2002 "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.' " *Young v. United States*, 535 U.S. 42, 48 (2002); *see also El Paso Natural Gas Co. v. Neztsosie*, 541 U.S. 473, 481-82 (1999) ("[Statutes of limitations are] not there to penalize parties who fail to assert their rights, but [are] meant to protect institutional interests in the orderly functioning of the judicial system . . . and encouraging repose . . . ."). As stated by the Court, there is "historic wisdom in the value of

repose." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005).

POINT III

A PROVISION OF A CONFIRMED CHAPTER 13 PLAN THAT DISCHARGES STUDENT LOAN DEBT IS BINDING AND EFFECTIVE BY VIRTUE OF BANKRUPTCY CODE § 1327(a) WHERE THE CREDITOR HOLDING THE CLAIM (1) RECEIVED ADEQUATE NOTICE OF THE PROPOSED PLAN AND THE PROCEEDING FOR ITS CONFIRMATION, AND (2) CHOSE NOT TO OBJECT

Bankruptcy Code § 1327(a) provides that "[t]he provisions of a confirmed plan bind . . . *each creditor*, whether or not the claim of such creditor is provided for by the plan, and *whether or not such creditor has objected* to, has accepted, or has rejected the plan."[4] (emphasis added). The question is whether the binding effect given by Congress to a confirmation order will be applied as written, or instead, narrowed by implying an exception where the confirmed plan is not in accord with §§ 523(a)(8) and 1328(a)(2).

This Court has often stated that when "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (cit-

[4] Similar provisions that bind creditors to confirmed plans are set forth in chapters 9, 11, and 12. *See* Bankruptcy Code §§ 944(a), 1141(a), 1227(a).

ing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

There is no room in the plain text of § 1327(a) to limit or restrict the binding effect of a confirmed chapter 13 plan by engrafting an exception for plans that discharge student loan obligations without a specific § 523(a)(8) undue hardship determination. Congress explicitly provided in § 1327(a) that confirmed plans would be binding on creditors, and the clear language of the statute bars post-confirmation objections to all provisions in a confirmed plan.[5]

Congress could not have intended § 1327(a) to be read other than in accordance with its plain text and to upset the finality of confirmation orders issued under any of the chapters of the Bankruptcy Code. In that provision, Congress made its intent clear and unmistakable that all provisions of a confirmed plan bind "each creditor," including creditors who have not "objected." Congress emphasized the extent of § 1327(a)'s binding effect on each creditor by providing that each is bound by the plan's provisions, even if the creditor has "rejected" the plan. Congress' purpose to preclude all post-confirmation attacks on provisions of confirmed plans, as unambiguously written into § 1327(a), could not be more clear.

No exception to the binding effect of all provisions of a confirmed plan was written into § 1327(a). The binding nature of confirmed chapter 13 plans follows the structure under Chapter XII of the former Bankruptcy Act, which also stated that a con-

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[5] Bankruptcy Code § 1330 authorizes a prompt motion to revoke confirmation, but only for fraud in procuring the confirmation order. No such motion or claim was made in this case.

firmed plan would be binding upon all creditors. *See* Pub. L. No. 696, ch. 575, § 657, 52 Stat. 840, 935 (1938) (repealed 1978) ("Upon confirmation of a plan, the plan and its provisions shall be binding upon the debtor and upon all creditors of the debtor, whether or not they are affected by the plan or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed or are allowable."). Congress, however, strengthened the pre-Code provision by adding to § 1327(a) language that expressly makes a confirmed plan binding on creditors who have not "objected."

Congress could have provided an explicit exception in § 1327(a). It did not do so. The language found in other chapters of the Bankruptcy Code illuminates that Congress knew how to create an exception in § 1327(a) if it wished to do so for student loan debts. For example, § 1141(a) provides that a plan of confirmation shall bind all creditors "[e]xcept as provided in subsections (d)(2) and (d)(3) of this section." Section 1141(d)(2) explicitly states, "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title," which includes student loan debt where there has been no determination of undue hardship. Similarly, § 1227(a) binds creditors to the terms of a confirmed plan "[e]xcept as provided in section 1228(a) of this title." Section 1228(a) explicitly prohibits a debtor from discharging a "debt of the kind specified in section 523(a) of this title." Congress knew how to write exceptions into those statutes, but did not provide any exception in § 1327(a) for student loan claims. Such an exception should not be grafted onto § 1327(a).

The Court should not find an exception to the binding effect of a confirmed plan that provides for the discharge of student loan debt, because that would invite student loan creditors to defer objecting to a plan as not confirmable until after the creditor received the benefit of the payments provided for by the plan, as the Petitioner did in this case. Creditors cannot have it both ways. They should not be allowed to accept the benefits of a plan only to attack its validity thereafter. Moreover, if the Court allows such post-confirmation attacks on chapter 13 plans, creditors would be encouraged to collect payments under a chapter 9, 11, or 12 plan and allowed to upset confirmed plans later on the basis of claimed legal errors in granting confirmation. Congress could not have intended § 1327(a) to be benign. *See* 8 COLLIER ON BANKRUPTCY, ¶ 1327.02[1][c], at 1327-8 (Allen N. Resnick et al. eds., 15th ed. rev. 2006) ("[Reading an exception for section 523 violations into section 1327(a)] would render any chapter 9, 11, 12 or 13 plan subject to attack after confirmation, and even after completion, for a violation of notice or service rules, in contravention of section 1327(a)."). A creditor should not be allowed to wait until an otherwise non-confirmable plan has been completed by payment, and then for the first time to pursue collection efforts and also to bring proceedings to undo confirmation.

To permit post-confirmation attacks on confirmation orders could result in voiding confirmation orders containing a variety of provisions that may be at odds with the Bankruptcy Code, but which are nevertheless found in plans of reorganization confirmed in cases under chapters 9, 11 and 12. *See e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005) (upholding a confirmed chapter 11

plan that enjoined suits against third parties, which violated § 524(e)); *In re American Preferred Prescriptions, Inc.*, 255 F.3d 87, 94-95 (2d Cir. 2001) (sustaining the post-confirmation appointment of a chapter 11 trustee, although § 1104(a) authorizes such appointment only before confirmation of a plan); *In re Penn-Dixie Industries, Inc.*, 32 B.R. 173, 177-79 (Bankr. S.D.N.Y. 1983) (upholding a chapter 11 plan that failed to properly classify tax debts, as required by § 1129(a)(9)); *In re County of Orange*, 219 B.R. 543, 566-67 (Bankr. C.D. Cal. 1997) (upholding a chapter 9 plan which subordinated a creditor's claim, in violation of § 1123(a)(4) as incorporated into chapter 9 by § 901(a)); *In re Watkins*, 240 B.R. 735 (Bankr. C.D. Ill. 1999) (upholding a chapter 12 plan that treated a junior lien holder's claim only as an unsecured claim, in violation of § 1225(a)(5)).

The sound administration of bankruptcy cases requires that provisions of plans of reorganization and of debt adjustment under the various chapters not be subject to attack by a creditor who has not objected to confirmation of the plan or appealed the confirmation order. The debtor and creditors must be able to rely on the confirmed plan and be confident that their post-confirmation conduct will not be undercut by post-confirmation attacks on the confirmed plan. Credit is extended to the reorganized debtor and other relationships are entered into in reliance of the finality of confirmation orders. Such orders are at the heart of reorganization and debt relief cases, and the bankruptcy laws could not function if they could be upset in a later proceeding, whether initiated in another proceeding in a different court, or in a later proceeding in the same bankruptcy case. Section 1327(a) should be applied

as written, rather than interpreting it in a way that could undercut reorganization under all of the chapters of the Bankruptcy Code.

The interest of the debtor and creditors in finality of confirmed plans is paramount. *See Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 891 F.2d 159, 162 (7th Cir. 1989) (citing cases). Finality is an essential element of any successful reorganization under the Bankruptcy Code, as evidenced by provisions in all chapters that a plan of reorganization is binding on all creditors.[6] Without finality, confirmation is meaningless. Indeed, in chapter 11 cases, in which confirmation is put to a vote, creditors would be unlikely to accept a plan, knowing that it could be undone later.

The binding nature of § 1327(a) is further supported by the fundamental policy of equitable mootness. When a party fails or neglects to diligently pursue its available remedies, the doctrine of equitable mootness precludes a party from obtaining

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[6] Bankruptcy Code §§ 944(a)(3), 1141(a), 1227(a), 1327(a). *See* Bankruptcy Code § 944(a)(3) ("The provisions of a confirmed plan bind the debtor and any creditor, whether or not . . . such creditor has accepted the plan"); Bankruptcy Code § 1141(a) (with exceptions, "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim or interest of such creditor . . . has accepted the plan"); Bankruptcy Code § 1227(a) ("the provisions of a confirmed plan bind the debtor [and] each creditor. . . whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor . . . has accepted, or has rejected the plan"); Bankruptcy Code § 1327(a) ("The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.").

appellate review. *See, e.g., In re Continental Airlines*, 91 F.3d 553, 559 n.1 (3d Cir. 1996); *In re Public Serv. Co.*, 963 F.2d 469, 472 (1st Cir. 1992); *In re Roberts Farms*, 652 F.2d 793, 798 (9th Cir. 1981). The passage of time and changes in parties' positions after a confirmation order has been issued are basic considerations that preclude efforts to overturn such an order. For these reasons, the doctrine of equitable mootness has developed in bankruptcy cases to dismiss appeals where relief could still be fashioned after substantial consummation of a plan of reorganization, but where it would be inequitable to do so. Several factors are considered in deciding whether an order has become equitably moot, including "the public policy of affording finality to bankruptcy judgments." *In re Continental Airlines, Inc.*, 91 F.3d at 560. As stated by a commentator, who is one of the *Amici* professors on this brief, the doctrine of equitable mootness promotes "finality and reliance upon the orders of a bankruptcy court regarding matters such as . . . plan confirmation." George W. Kuney, *Slipping Into Mootness*, 2007 ANN. SURV. BANKR. LAW, ART 9, 267 at 279-80. Analogous to this long-standing doctrine, § 1327(a) binds parties who do not exercise their rights to object to confirmation or appeal a confirmation order.

CONCLUSION

For the foregoing reasons, the Court should sustain the confirmation order and discharge in this case, either on the basis of the doctrine of *res judicata*, or by ruling that § 1327(a) should be applied as written. The *Amici* thus urge the Court to affirm the order below.

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AMICUS CURIAE BRIEF

No. 08-1134

IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Macklin Fleming Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, and argument and reason. He began teaching at Yale in 1990 and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author to COLLIER ON BANKRUPTCY, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008); *Travelers*

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith.

Cas. & Sur. Co. v. Pacific Gas & Elec. Co., 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). During this term, he will be arguing *Schwab v. Reilly*, No. 08-538, and *Milavetz, Gallop & Milavetz, P.A. v. United States*, Nos. 08-1119, 08-1225. He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *Howard Delivery Serv., Inc. v. Zurich American Ins., Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law, and has written, taught, and lectured on the subject of bankruptcy plans, the proper treatment of claims under plans, and the finality of orders confirming a

plan. The purpose of this brief is to address matters that bear on the Court's determination of a critically important issue of bankruptcy law: whether a creditor who receives notice of a debtor's bankruptcy case, who fails to object to the proposed treatment of its claim in the debtor's plan, and who then receives payments under the plan following the plan's confirmation, may subsequently ignore the plan and violate the debtor's discharge on the basis of an alleged defect in the plan that the creditor could and should have raised prior to the plan's confirmation.

Bankruptcy courts confirm tens of thousands of plans each year. Creditors routinely decline to object to these plans even though they may have a meritorious objection, in many instances because they conclude that the plan offers the best means of receiving the highest recovery on their claims. In the absence of a timely and successful appeal from an order confirming a plan, confirmation of the plan results in a final judgment that is binding on all parties. Debtors rely on this finality, as do others who interact with debtors following their emergence from bankruptcy.

In this context, petitioners advocate an untenable rule that would essentially defeat the plan process: namely, that they need not assert any objection they may have to a plan prior to

the plan's confirmation, may receive payments from the debtor for years in accordance with the plan, and then, after the debtor believes he or she is finished making all payments, assert their objection in order to avoid the debtor's discharge and obtain perhaps even greater payment. If this were the rule, our bankruptcy system would collapse of its own weight because one of its most essential underpinnings – finality – would be effectively eroded. But this is not the rule, as established by several provisions of the governing Bankruptcy Code and the precedents of this Court. The undersigned presents this brief to address these important matters.

STATEMENT

Between 1988 and 1989, respondent Francisco J. Espinosa ("Espinosa") obtained $13,250 in student loans. Joint Appendix ("JA") 16. He apparently hoped that the educational training that these loans funded would generate better employment opportunities. Unfortunately, that did not occur, and he found himself unable to bear the burden of his debt. On December 7, 1992, he commenced a chapter 13 bankruptcy case in the United States Bankruptcy Court for the District of Arizona. JA 5.

The Bankruptcy Code requires each chapter 13 debtor to propose a plan. 11 U.S.C. §

1321.[2] The purpose of the plan is to describe the debtor's proposed treatment of his or her debts, and the plan must provide that the debtor will dedicate future earnings or other income as necessary for the payment of claims as set forth in the plan. 11 U.S.C. § 1322(a)(1). Although creditors are not entitled to vote on a chapter 13 plan, any creditor may insist that the debtor either propose to pay the creditor's claim in full, or, if the debtor cannot pay claims in full, at least dedicate all of the debtor's "disposable income" to the payment of claims for not less than three years. 11 U.S.C. § 1325(b)(1). As is relevant here, the term "disposable income" is defined to mean the amount of the debtor's income that is not reasonably necessary for the debtor's maintenance and support. 11 U.S.C. § 1325(b)(2)(A).

At the time Espinosa commenced his bankruptcy case, his student loans were held by petitioner United Student Aid Funds, Inc. ("Funds"). JA 16. Espinosa's chapter 13 plan (the "Plan") provided for the payment in full of the original principal amount of these loans. JA 26. To accomplish this, Espinosa proposed to dedicate slightly more than his monthly disposable income to pay off this amount over time. JA 22-23.

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[2] References to the Bankruptcy Code are to the provisions of the Code in effect at the time of Espinosa's bankruptcy filing in 1992. Relevant provisions are reproduced in the statutory appendix accompanying this brief.

Further, the plan obligated him to make his monthly payments for a five-year period, rather than the standard three-year term. *See* 11 U.S.C. § 1322(c) (providing that a plan ordinarily cannot propose a payment period greater than three years, and absolutely cannot propose a payment period in excess of five years). In other words, Espinosa proposed to pay the Funds *more* than the maximum monthly amount a creditor may require from the debtor in a chapter 13 case, and to make his payments for the maximum amount of time that chapter 13 permits.

Funds filed a proof of claim asserting that the amount owed under the loans was approximately $17,832, a sum that exceeded the principal balance of the loans by roughly $4,582. JA 35. The Plan specifically provided, however, that "[t]he amounts claimed by the [Funds] for capitalized interest, penalties, and fees shall not be paid for the reasons that the same are penalties and not provided for in the loan agreement between the Debtor and the lender." JA 26. The Plan further provided that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." JA 26. Following the resolution of a minor objection by the trustee, the

bankruptcy court issued an order confirming the Plan on May 6, 1993. JA 42-43.[3]

Funds failed to object to the Plan, either before or after the bankruptcy court entered its confirmation order. Pet. App. 5-6. Indeed, Funds failed to object to the Plan even after the trustee specifically notified Funds that it would receive less than the amount set forth in its proof of claim under the provisions of the Plan. JA 44-45.

By operation of law, after a debtor completes making payments under his chapter 13 plan, the debtor is entitled to a discharge. 11 U.S.C. § 1328. The effect of the discharge is to release the debtor from personal liability for most pre-petition monetary obligations, and the discharge acts as a type of injunction against further debt collection activity on discharged debts. 11 U.S.C. § 1328(c); *see also* 11 U.S.C. § 524. The scope of a discharge is subject to certain exceptions. 11 U.S.C. §§ 523, 1328(c). Student loans insured or guaranteed by a governmental unit are among the exceptions, "unless...excepting such debt from discharge...will impose an undue hardship on the

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[3] In chapter 13 cases, a trustee is appointed to supervise the process and administer the confirmed plan. 11 U.S.C. § 1302.

debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

A proceeding to declare the dischargeability of a particular debt under section 523, including a debt for a student loan that poses an undue hardship, is customarily pursued as an "adversary proceeding" commenced by either the debtor or the creditor with the filing of a complaint. Fed. R. Bankr. P. 7001(6); *see also* Fed. R. Bankr. P. 4007. In this case, Espinosa did not commence an adversary proceeding or file a motion specifically seeking an undue hardship determination. Instead, as noted, Espinosa provided in his Plan for the full payment of the principal amounts due on his student loans, and provided for the discharge of any other amounts related to the loans. JA 26. In addition, Espinosa proposed to devote more than his available "disposable income" to fund payment of this debt. In other words, Espinosa essentially offered Funds a compromise: he would devote all of his disposable income (and then some) to pay his student loan debt for five years, but beyond that the debt would be extinguished.

As noted, Funds did not object to this treatment – perhaps because it believed it was a good deal under the circumstances – and the bankruptcy court entered an order confirming the Plan. On May 30, 1997, following Espinosa's successful completion of all payments required

under his Plan, including his payment in full of the principal amounts due on his student loans, the bankruptcy court granted Espinosa his discharge. JA 46.[4]

By operation of law, "[t]he provisions of a confirmed plan bind the debtor and each creditor" regardless of whether "the claim of such creditor is provided for by the plan" and regardless of whether "such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). Likewise, following confirmation of a plan, a party in interest may seek to revoke confirmation within 180 days "after the date of the entry of an order of confirmation" and only "if such order was procured by fraud." 11 U.S.C. § 1330(a). At no time during the 180 days following confirmation of Espinosa's Plan did Funds seek to revoke the order confirming the Plan. Likewise, Funds did not appeal the order confirming the Plan.

Three years after the bankruptcy court granted Espinosa's discharge, and eight years after the Plan was confirmed, Funds (in conjunc-

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[4] While a clerical error in the bankruptcy court's order erroneously included an exception to discharge for any debt "for a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8)," that error was acknowledged and corrected by the bankruptcy court on remand from the Ninth Circuit. JA 46, 48.

tion with the Education Department) began intercepting Espinosa's income tax refunds in an effort to obtain the unpaid portion of its claim. Pet. App. 6. Thereafter, Espinosa filed a motion with the bankruptcy court requesting an order holding Funds in contempt for violating the discharge injunction. Pet. App. 6.

The bankruptcy court ruled in favor of Espinosa. Pet. App. 7. On appeal, the district court reversed, ruling that the confirmation order was void for lack of due process. Pet. App. 7. On appeal from the district court, the Ninth Circuit reversed and remanded the case to the bankruptcy court for the resolution of a clerical error.[5] Following the bankruptcy court's resolution of the error, the Ninth Circuit reversed the district court, explaining that "student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan." Pet. App. 26.

SUMMARY OF THE ARGUMENT

Sections 523(a)(8) and 1328(a)(2) provide that student loans are dischargeable only upon a showing of "undue hardship." In contrast, section 1327(a) provides that the provisions of a confirmed plan "bind" the debtor and creditors, and section 1330(a) provides that a confirmation

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[5] *See supra* note 4.

order may be revoked within 180 days of its entry "if...procured by fraud." Funds argues that sections 523(a)(8) and 1328(a)(2) trump the bankruptcy court's order confirming Espinosa's Plan, and that Funds' failure to object to the Plan is therefore of no effect. But consistent with sections 1327(a) and 1330(a), this Court has repeatedly upheld the enforceability of a bankruptcy court's orders once they have become final, including orders confirming bankruptcy plans, and has turned away subsequent attempts to challenge the enforceability of those orders for procedural defects or substantive deficiencies that could have been raised earlier. *See, e.g., Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2198 (2009); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

Consistent with the Court's precedents, as well as the text, logic, history, and purpose of the Bankruptcy Code, the better view is that sections 1327 and 1330 supply the correct rule of decision here. If a creditor with notice has grounds for objecting to a plan, including on the basis that its claim is not being treated in a manner consistent with the Code, the creditor must assert those grounds prior to confirmation, or forfeit any right to do so. A creditor with notice may not wait until after confirmation to assert an objection on the theory that the unarticu-

lated objection silently rendered the confirmation order void.

Important reliance interests are at stake, as well as interests of fundamental fairness. In proposing their plans in good faith to resolve their financial difficulties, chapter 13 debtors rely on creditors to object if, in fact, a creditor intends to oppose the debtor's proposal. Likewise, debtors rely on the finality of plans in making their payments under them, as do other persons who interact with these debtors. A creditor cannot withhold an objection to confirmation, receive payments under a confirmed plan, and then successfully assert its objection thereafter in the hope of receiving still more. Such a rule would only encourage creditors to ignore the confirmation process, and would essentially hobble the bankruptcy system and the goals that it promotes, including the debtor's fresh start. The decision of the court below should be affirmed.

A. Funds' Position Irreconcilably Conflicts with Sections 1327(a), 1330(a), and Prior Decisions of this Court.

Section 1327(a) provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. §

1327(a). By its plain terms, section 1327(a) thus fixes the effect of a confirmed plan.

In turn, section 1330(a) provides that, on request of a party in interest "at any time within 180 days after entry of an order of confirmation," the bankruptcy court may revoke the order if "procured by fraud." 11 U.S.C. § 1330(a). By its plain terms, section 1330(a) thus prescribes the parameters for revoking an order of confirmation.

By design, sections 1327(a) and 1330(a) inject strong rules of finality into the plan confirmation process. These rules mirror the precedents of this Court, and likewise supply the relevant rule of decision applicable in this controversy.

1. *Travelers Indemnity Co. v. Bailey*

In *Travelers Indemnity Co. v. Bailey*, the Court considered the finality of a bankruptcy court's orders barring claims against a debtor's third party insurer entered in conjunction with the debtor's confirmed chapter 11 plan. 129 S. Ct. at 2198. The case involved the Johns-Manville Corporation ("Manville"), a processor of asbestos and manufacturer of asbestos-containing products. The Travelers Indemnity Company and its affiliates ("Travelers") were Manville's primary liability insurers. In 1982, Manville filed for bankruptcy in response to a

deluge of lawsuits seeking to hold it responsible for a broad variety of asbestos-related injuries. *Id.* at 2198-99.

Manville's reorganization plan created the Manville Personal Injury Settlement Trust ("Trust") to pay asbestos claims filed against Manville, and Manville's plan provided that all such claims would be "channeled" to the Trust, leaving the reorganized Manville free from these liabilities. *Id.* at 2199. The "cornerstone" of the plan was a settlement whereby Manville's insurers, including Travelers, agreed to provide most of the initial funding for the Trust. *Id.* The settlement was made possible by a December 18, 1986 order of the bankruptcy court (the "Settlement Order") approving the settlement agreement and enjoining all persons from "commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group." *Id.* The bankruptcy court's December 22, 1986 order confirming Manville's plan incorporated the Settlement Order by reference, and both the confirmation order and the Settlement Order were affirmed by the district court and, subsequently, the court of appeals. *Id.* at 2219-20.

Over ten years later, plaintiffs filed various asbestos actions against Travelers for liability related to its provision of insurance to Man-

ville (the "Direct Actions"). *Id.* at 2200. In 2002, Travelers returned to the bankruptcy court, invoking the terms of the 1986 orders and moving to enjoin the Direct Actions. *Id.* The bankruptcy court held an evidentiary hearing, made extensive findings, and held that the Direct Actions arose out of and were related to the insurance policies, and were therefore barred under the terms of the 1986 orders. *Id.* at 2201. The district court affirmed, but the Second Circuit reversed, holding that the bankruptcy court "mistook its jurisdiction when it enjoined 'claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate,' because 'a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'" *Id.* at 2202. In other words, the Second Circuit concluded that the bankruptcy court lacked the authority to enjoin the actions against Travelers in the first place.

On further review, this Court reversed the Second Circuit, holding that "the 1986 Orders became final on direct review over two decades ago," and therefore "whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and [likewise was] not properly before [this Court]." *Id.* at 2203. The Court held further that,

> where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect. . . . If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, *see* R. Lord, *Williston on Contracts* § 30:4 (4th ed. 1999), it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms. This is all the Bankruptcy Court did.

Id. at 2204 (internal citations omitted). In addition, the Court held that, even if it found the 1986 orders to be ambiguous, "it is far from clear that respondents would be entitled to upset the Bankruptcy Court's interpretation of the 1986 Orders," because a "bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference." *Id.* at 2204 n.4. Stressing the need for finality, the Court concluded that "[a]lmost a quarter-century after the 1986 Orders were entered, the time to prune them is over." *Id.* at 2206.

The Court's decision in *Bailey* has direct bearing here. Just as the plaintiffs in *Bailey* could not ignore or avoid the bankruptcy court's

confirmation of Manville's plan or its injunction barring actions against Manville's insurers, Funds cannot ignore the bankruptcy court's confirmation of Espinosa's Plan or its order granting Espinosa his discharge following completion of his plan payments. Whatever merit Funds' objection to the discharge of its claims might have had prior to confirmation, Funds' opportunity to assert its objection has long since passed, and it cannot now upset the finality of Espinosa's Plan or the bankruptcy court's order granting Espinosa his discharge.

2. *Celotex Corp. v. Edwards*

In *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), plaintiffs sued Celotex in the federal district court, alleging asbestos-related injuries. *Id.* at 302. The district court entered a judgment against Celotex, and, to stay execution pending appeal, Celotex posted a supersedeas bond with Northbrook Property and Casualty Insurance Company (Northbrook) serving as surety. *Id.* The Fifth Circuit affirmed the judgment, rendering it "final." *Id.* On the same day, Celotex commenced a chapter 11 bankruptcy case. *Id.*

Shortly thereafter, the bankruptcy court entered an injunction pursuant to 11 U.S.C. § 105 staying all proceedings involving Celotex, including any action against Northbrook. *Id.* at 303. Ignoring the injunction, plaintiffs filed a motion with the district court seeking permission

to execute against Northbrook on the supersedeas bond pursuant to Fed. R. Civ. P. 65.1. *Id.* Celotex and Northbrook argued that the bankruptcy court's injunction applied, barring execution. *Id.* The district court disagreed, and permitted plaintiffs to execute on the bond against Northbrook. *Id.* at 304. On appeal, the Fifth Circuit affirmed, but this Court reversed. *Id.* at 305-6.

The Court began by noting the well-settled rule that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *Id.* at 306 (citation and internal quotation marks omitted) (citing *Oriel v. Russell*, 278 U.S. 358 (1929)). Plaintiffs attempted to argue that section 1334(b), vesting the bankruptcy court with jurisdiction to apply the provisions of the Bankruptcy Code, must be "harmonized" with Fed. R. Civ. P. 65.1, providing an expedited procedure for executing on supersedeas bonds. *Celotex*, 514 U.S. at 311. The Court disagreed, holding that the bankruptcy court's order trumped the procedural rule: "This Rule outlines a streamlined *procedure* for executing on bonds...Just because the Rule provides a simplified procedure for collecting on a bond, however, does not mean that such a procedure, like the more complicated procedure of a full-

fledged lawsuit, cannot be stayed by a lawfully entered injunction." *Id.* at 312.

The Court concluded that if plaintiffs desired to challenge the injunction, "they should have challenged it in the Bankruptcy Court." *Id.* at 313. Moreover, this Court explained that if the plaintiffs were dissatisfied with the bankruptcy court's decision, they should have taken a direct appeal to the district court and, if necessary, to the Eleventh Circuit. *Id.* What they could not do was "collaterally attack the Bankruptcy Court's Section 105 injunction...without seriously undercutting the orderly process of the law." *Id.*

The Court's decision in *Celotex* also has bearing here. Just as the plaintiffs in *Celotex* could not ignore the bankruptcy court's injunction and proceed to enforce their claim against the debtor's surety, Funds cannot ignore the bankruptcy court's confirmation of Espinosa's Plan and discharge order. To the extent Funds desired to challenge the Plan and its provision for the discharge of its claim, Funds was required to object to the Plan on a timely basis. If Funds were dissatisfied with the bankruptcy court's resolution of its objection, Funds could and should have taken a direct appeal to the district court or, if necessary, to the Ninth Circuit. What Funds cannot do without seriously undercutting the orderly process of the law is ignore

the bankruptcy court's discharge order, commence debt collection activities against Espinosa after Espinosa completed his payments under his Plan, and then claim that the bankruptcy court's order was void on the basis of an alleged defect that Funds could and should have asserted in the confirmation proceeding.

3. *Chicot County Drainage Dist. v. Baxter State Bank*

In *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the bankruptcy court[6] approved the plan of reorganization of the Chicot County Drainage District ("District") canceling the bonds of Baxter State Bank ("Baxter"). *Chicot*, 308 U.S. at 373. In reliance on the bankruptcy court's jurisdiction to confirm the plan, the Reconstruction Finance Corporation ("RFC") made a loan to the District and purchased a number of the District's old bonds. *Id.* Subsequently, in an unrelated case, this Court declared unconstitutional the provisions of the Bankruptcy Act under which the bankruptcy court had approved the District's plan. *Id.* at

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[6] Under the prior bankruptcy acts, district courts were vested with the jurisdiction of bankruptcy courts and would sit as a court of bankruptcy in bankruptcy matters. *See* Act of July 1, 1898, ch. 541, § 2, 30 Stat. 545, 11 U.S.C. § 11 (repealed 1979). For clarity, the term "bankruptcy court" will be used to refer to such circumstances in this brief.

373-74. Thereafter, Baxter sought to recover on its bonds, arguing that the bankruptcy court lacked jurisdiction to cancel them owing to the unconstitutionality of the governing statutory scheme. *Id.*

Rejecting Baxter's claim, the Court stated bluntly: "We think the argument untenable." *Id.* at 376. As the Court recognized, "[t]he lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Id.* Nevertheless, "they are courts with authority . . . to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act." *Id.* The Court concluded that "[t]heir determinations of such questions, while open to direct review, may not be assailed collaterally." *Id*; *see also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 n.13 (1982) ("The need for finality within our federal system...applies with equal force to questions of jurisdiction.") (citations omitted).

The Court's decision in *Chicot* is directly analogous. Just as the creditor in *Chicot* could not ignore the bankruptcy court's confirmation order cancelling its bonds on the belated theory that the bankruptcy court's exercise of its authority was unconstitutional, Funds cannot now

argue successfully long after the fact that the bankruptcy court's orders confirming Espinosa's Plan and granting him a discharge exceeded the court's authority. Once again, the need for finality prevails.

4. *Stoll v. Gottlieb*

Finally, in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), the bankruptcy court entered an order confirming the plan of reorganization of the debtor Ten Fifteen North Clark Building Corp. ("Ten Fifteen"). *Id.* at 169. The plan and confirmation order enjoined creditor William Gottlieb ("Gottlieb") from pursuing a claim directly against third party J. O. Stoll ("Stoll") based on Stoll's guaranty of Ten Fifteen's debt to Gottlieb. *Id.* at 168-69. Notwithstanding the bankruptcy court's order extinguishing the liability, Gottlieb subsequently pursued his guaranty claim against Stoll in a collateral proceeding. *Id.* at 169. Gottlieb argued in the subsequent proceeding that the bankruptcy court lacked authority to enter any order barring his pursuit of his guaranty claim against Stoll. *Id.* On review, this Court held that, regardless of whether the bankruptcy court had jurisdiction to enter its order in the first place, the bankruptcy court's original jurisdiction was not subject to challenge in a collateral proceeding, but was binding on Gottlieb. *Id.* at 172.

The Court began its analysis by reciting the familiar rule that "[a] court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." *Id.* at 171. Nonetheless, the Court explained that "[t]here must be admitted . . . a power to interpret the language of the jurisdictional instrument and its application to an issue before the court." *Id.* The Court likewise explained that "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation." *Id.* at 172. Further, "[t]here is no reason to expect that the second decision will be more satisfactory than the first." *Id.*; *see also* 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4428, at 23 (2d ed. 2002); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.30[1][d][iii] (3d ed. 2009); *see generally Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (describing the *Stoll* decision as one where "a judgment rendered in a case in which it was ultimately concluded that the District Court was without jurisdiction was nonetheless res judicata on collateral attack made by one of the parties") (citing *Stoll v. Gottlieb*, 305 U.S. 165 (1938)); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

The Court's decision in *Stoll* is directly analogous. Just as the creditor in *Stoll* could not

ignore the bankruptcy court's order enjoining him from pursuing his guaranty claim, Funds cannot ignore the bankruptcy court's confirmation of Espinosa's Plan and its discharge of Espinosa's unpaid indebtedness. *Stoll* is all the more relevant because the nature of the creditor's objection in *Stoll* is precisely the same as the Funds' objection here.

Stoll was decided under the former Bankruptcy Act of 1898. Section 16(a) of the Act provided expressly that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Act of July 1, 1898, ch. 541, § 16(a), 30 Stat. 550, 11 U.S.C. § 35 (repealed 1979).[7] In other words, section 16(a) rendered Gottlieb's guaranty claim against Stoll nondischargeable in Ten Fifteen's bankruptcy proceeding. Nonetheless, Ten Fifteen provided in its plan that Stoll's guaranty liability would be extinguished. Gottlieb had notice of the bankruptcy, yet failed to object to this provision prior to confirmation of the plan. Accordingly, the court confirmed the plan, which thus became binding on all parties and discharged the guaranty obligation.[8] As a result,

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[7] The Bankruptcy Code contains a similar provision. *See* 11 U.S.C. § 524(e).

[8] Ten Fifteen confirmed its plan under section 77B of the former Bankruptcy Act of 1898. *See Stoll*, 305 U.S. at

Gottlieb was bound by the plan and his claim was discharged notwithstanding the clear terms of section 16(a) providing that the debt was *not* dischargeable. Gottlieb could and should have voiced his objection based on section 16(a) prior to confirmation of the plan. Because he failed to do so, he was bound by the plan and his claim was released.

In this case, Funds makes the same argument. Funds asserts that section 528(a)(8) renders its claims nondischargeable absent a finding of undue hardship. Yet Funds failed to voice this objection prior to confirmation of Espinosa's Plan, which clearly provided that, upon completion of his plan payments, any unpaid portion of Funds' claim would be discharged. Because Funds failed to make its argument in a timely fashion, its argument has been waived. As a result, following Espinosa's discharge, Funds could not engage in any debt collection activity against

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168; Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 912, 11 U.S.C. § 207 (repealed 1938). Like section 1327(a), section 77B(g) provided that the provisions of a confirmed plan "shall be binding upon...the debtor...and...all creditors..." Act of June 7, 1934, ch. 424, § 77B(g), 48 Stat. 920, 11 U.S.C. § 207(g) (repealed 1938). Similarly, section 77B(h) provided that the final decree in the case operated to "discharge the debtor from its debts and liabilities...except as provided in the plan..." Act of June 7, 1934, ch. 424, § 77B(h), 48 Stat. 920, 11 U.S.C. § 207(h) (repealed 1938).

Espinosa attempting to recover any additional sums beyond the payments Espinosa made under his Plan.

B. Funds' Position Conflicts With The Essential Logic and Operation of the Bankruptcy Process.

Bankruptcy proceedings are fundamentally *in rem* in nature. Upon commencement of a bankruptcy case, the debtor's property resides in the custody of the bankruptcy court. *Straton v. New*, 283 U.S. 318, 320-21 (1931); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189-90 (1902). Likewise, a bankruptcy court's *in rem* jurisdiction is premised on the debtor and his estate, not his creditors. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). Jurisdiction of this kind allows a bankruptcy court to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" *Id.* at 448 (quoting 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 108.70[1], at 108-106 (3d ed. 2004)).

The discharge of a debt is also an *in rem* remedy, and creditors are generally bound by a discharge order. *Hood*, 541 U.S. at 447. Similar to admiralty law, the *in rem* aspects of bankruptcy law are essential to the functioning of the bankruptcy court and, for over two centuries, have been an intrinsic part of bankruptcy juris-

prudence. It is only because the bankruptcy process is binding on all creditors that the critical functions of bankruptcy law – granting the debtor a fresh start, protecting and preserving an insolvent debtor's assets, and the adjustment and payment of claims against those assets – may be performed. As this Court has noted, it is by virtue of the binding nature of its determinations that "[a] bankruptcy court is able to provide the debtor a fresh start . . . despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Id.* Accordingly, once a bankruptcy plan is confirmed, it is binding on all parties, and once the opportunity for direct appeal has passed, the confirmation order is a final judgment, immune from challenge on collateral review. *Travelers*, 129 S.Ct. at 2206; *Stoll*, 305 U.S. at 171-72; *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1997).

The Funds' position in this case stands at odds with these essential principles and places in jeopardy a variety of bankruptcy objectives by eroding the finality of the bankruptcy court's jurisdiction to implement them. Obviously, the benefits of a bankruptcy court's confirmation of a debtor's plan and entry of a discharge order would be eroded dramatically if the bankruptcy court's orders were subject to collateral attack, or could be simply ignored. *See* 5 COLLIER ON BANKRUPTCY ¶ 1141.01[1] (15th ed. 1995).

Funds seeks shelter in this Court's decision in *Hood*, but *Hood* does not support its position. To begin with, *Hood* involved a proceeding under chapter 7 of the Bankruptcy Code, in which plans are not used and payments under plans are not made. More important, finality was irrelevant in *Hood* because the debtor had failed in the first instance to list her student loans and have them included in her general discharge order. 541 U.S. at 444 ("Hood did not list her student loans in the bankruptcy proceeding, and the general discharge did not cover them."). Accordingly, her creditor was not given the opportunity to contest the discharge's coverage of her debt because no order had been issued purporting to discharge it.

In contrast, in this case Espinosa's Plan specifically dealt with his student loan obligations, and Funds had every opportunity prior to confirmation to object to its proposed treatment under the Plan. JA 26, 42-45. Following Espinosa's full completion of his payments under his Plan, the bankruptcy court issued its discharge order, which order did *not* except Espinosa's student loans from discharge (leaving aside the clerical error that was later rectified). JA 46, 48. Funds' failure to make a timely objection to the Plan, or otherwise challenge or appeal the orders confirming the plan and granting

Espinosa his discharge, are properly fatal to its arguments in this case.

CONCLUSION

For the foregoing reasons, as well as those offered by respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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